Northwestern University School of Law
Public Law and Legal Theory Papers

Year 2004 *Paper* 15

Trait Discrimination as Sex Discrimination: An Argument Against Neutrality

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Abstract

Title VII prohibits discrimination whereby women or men are denied employment opportunities because of their status as such. Much of the employment discrimination taking place today, however, targets not all women or men, but only those with particular traits or characteristics - for example, women who are aggressive or men who are effeminate. This article addresses the question of when, if ever, trait discrimination is actionable sex discrimination under Title VII. The dominant response advocated by scholars has been to require employers to act in a rigid and formalistically sex-neutral manner toward their employees. If an employer allows female employees to wear dresses, the employer must allow male employees to wear dresses as well. To do otherwise is actionable sex discrimination. This paper suggests a new response to trait discrimination that returns to Title VII's original focus on ending status-based hierarchy. The power/access approach advocated in this paper treats trait discrimination as actionable sex discrimination only when it stems from gender norms and scripts that are themselves incompatible with sex equality in the workplace. The paper contends, in contrast to most current argument, that rigid sex neutrality is neither required by Title VII nor socially desirable.

TRAIT DISCRIMINATION AS SEX DISCRIMINATION: AN ARGUMENT AGAINST NEUTRALITY

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Before the passage of the Civil Rights Act of 1964, many jobs in America were formally sex-segregated.[1] Employers openly and unabashedly excluded women from desirable high paying jobs reserved for men.[2] The story of Justice Sandra Day O'Connor being unable to find a law firm job other than as a legal secretary after graduating at the top of her class from Stanford Law School in 1952 is now well-

[*] Assistant Professor Northwestern University School of Law. I am grateful to Larry Alexander, Ron Allen, Michael Barsa, Cynthia Bowman, David Dana, Shari Diamond, Mark Kelman, Andy Koppelman, Jim Lindgren, Sai Prakash, and Max Schanzenbach for comments and suggestions on earlier drafts. I am also grateful to Mary Anne Case who, while disagreeing with much of this article, graciously encouraged me to strengthen my arguments. I received very helpful comments from participants at the Northwestern Law School faculty workshop, the University of Pennsylvania Law School faculty workshop, and the Midwest Political Science Association panel on Gender and Law. I am thankful to the Northwestern University School of Law Summer Faculty Research Program for its generous support. Finally I would like to thank my research assistants Crystina Coats and Karen Housler, and my library liason Marcia Lehr for their excellent assistance. I dedicate this article to the memory of Susan Moller Okin, a brilliant and bold person I was fortunate to know as a teacher, mentor and friend.

[1] *See* SHARON WHITNEY, THE EQUAL RIGHTS AMENDMENT: THE HISTORY AND THE MOVEMENT 20 (1984); DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 58 (1989).

[2] Diane Bridge describes, for example, a Westinghouse manual from the early 1900's which provided that: "the lowest paid male job was not [to] [sic] be paid a wage below that of the highest paid female job, regardless of the job content and value to the firm." She also quotes the International Ladies' Garment Workers' Union contract from 1913 which limited women to the less skilled jobs and provided that "the highest paid female could not earn more than the lowest paid male." *See* Diane L. Bridge, *The Glass Ceiling and Sexual Stereotyping: Historical and Legal Perspectives of Women in the Workplace*, 4 VA. J. SOC. POL'Y & L. 581 (1997).

known and almost quaintly anachronistic.[3] Her experience, however, was typical of the time.[4]

Indeed, private discrimination was in some cases required by state law. "By the mid-1960's 26 states prohibited women from working in certain jobs and 19 states had hours regulations for women workers."[5] Women were statutorily excluded from jobs that required heavy lifting[6] as well as from work as diverse as tending bar,[7] shining shoes, and legislative service.[8] Society viewed men as primary labor market participants and primary wage earners. Society viewed women as peripheral market participants and supplemental wage earners seeking "pin money."[9]

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[3] *See* Women's History Month Biography, Sandra Day O'Connor at http://www.gale.com/free_resources/whm/bio/oconnor_s.htm; *see also* Mary Jo White, *Remarks: The 2002 Sandra Day O'Connor Medal of Honor Recipient*, 26 SETON HALL LEGISLATIVE J. 263, 266 (2002).

[4] *See* Barbara Allen Babcock, *Forward: A Real Revolution*, 49 U. KANSAS L. REV. 719, 721 (2001) (describing the "open and rank discrimination" faced by female lawyers when she graduated from Yale Law School in 1963). *See also* RHODE, *supra* note __ at 55 (noting that "[a]n extensive survey of law school graduates and administrators in the mid-1960's reported almost two thousand separate occasions on which employers had disclosed policies against hiring women").

[5] KAREN J. MASCHKE, LITIGATION, COURTS AND WOMEN WORKERS 5 (1989).

[6] *See Bowe v. Colgate Palmolive*, 416 F.2d 711, 717-18 (7th Cir. 1969) (referring to state laws excluding women from jobs which require lifting heavy weights); *Rosenfeld v. Southern Pac. Co.* 293 F. Supp. 1219 (C.D. Cal. 1968) (ruling on a post Title VII challenge to California's "hours and weights legislation" which barred women from jobs involving lifting of certain weights).

[7] *See Goesaert v. Cleary*, 335 U.S. 464 (1948) (upholding a Michigan statute prohibiting women from tending bar unless they were the wives or daughters of male owners).

[8] RHODE, *supra* note __ at 44 (explaining that "[d]uring the late nineteenth century, legislatures began passing an increasing volume of exclusionary laws, and by mid-twentieth century, women in half the states were banned from work ranging from shining shoes to legislative service").

[9] *See* WHITNEY, *supra* note __ at 14 (noting that in the Great Depression "the myth that most women were working simply to earn 'pin money'

It was in this social climate that Title VII of the Civil Rights Act of 1964 was passed. Much has been made of the fact that "sex" was introduced into the Civil Rights Act one day before its passage in the House by a Southern representative who was strongly opposed to the Act.[10] Indeed, it is often said that the amendment to include sex as a protected category was proposed as a last ditch attempt to kill the Act.[11] While this may have been the motive of some of the amendment's sponsors, the push to include sex in the Civil Rights Act was not some spontaneous joke. It was in many ways the culmination of 40 years worth of attempts to pass a Constitutional amendment guaranteeing women equal rights.[12] Statements made on the floor of the House by supporters of the sex discrimination amendment make clear that they intended the prohibition to end the blanket

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for luxuries took over. Only men were recognized as legitimate breadwinners, and twenty-six state legislatures passed laws forbidding employers to hire married women").

[10] The amendment to include sex in the Act was introduced by Representative Howard Smith, a conservative representative from Virginia who opposed the Civil Rights Act. Although Smith opposed the Civil Rights Act he had been a prior sponsor of the Equal Rights Amendment for women. *See* Bridge, *supra* note __ at 610; RHODE, *supra* note __ at 57. *See also Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982); Note, *Sex Discrimination*, 84 HARV. L. REV. 1166, 1167 (1971).

[11] *See* WHITNEY, *supra* note __ at 19 (opining that "[i]n an effort to defeat [Title VII] . . ., a group of conservative southern representatives added the word 'sex' to the list [of prohibited characteristics]. They figured if women's rights were coupled with black civil rights, the bill would be such a joke it would fail").

[12] As Katherine Franke has noted, there was a record of congressional thinking about the employment rights of women stemming from Congress' consideration of prior sex equality legislation beginning with the introduction of the first Equal Rights Amendment Act in Congress in 1923. *See* Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 14-24 (1995). *See also* UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964 [hereinafter LEGISLATIVE HISTORY] 3224 (testimony of Representative May that an equal rights for women amendment had been proposed in the House since 1923).

exclusion of women from jobs and to dismantle the sex-based hierarchy of the work world that such exclusion maintained.[13]

Title VII has been extremely effective at ending formal sex segregation.[14] Discrimination rarely these days

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[13] Representative Griffiths argued that without including protections for sex in the Act women would continue to populate lower paid jobs and be excluded from better jobs reserved for men. *See* LEGISLATIVE HISTORY, *supra* note __ at 3210. Moreover she argued that the prohibition of sex discrimination was needed to eradicate states' protective legislation that only served to entrench women's subordinate employment position. Griffith's argued that "some protective legislation was to safeguard the health of women. But it should have safeguarded the health of men, also. Most of the so-called protective legislation has really been to protect men's rights in better paying jobs." *Id.* at 3219. Similarly, Representative St. George argued in favor of the amendment as a way to challenge restrictive protective labor laws that prevented "women from going into the higher salary brackets." *Id*. at 3221. St George explained: "Women are protected—they cannot run an elevator late at night and that is when the pay is higher. They cannot serve in restaurants and cabarets at night—when the tips are higher—and the load . . . is lighter." *Id*. at 3221. *See also Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 160 (1976) (Brennan, J. dissenting) (arguing that the primary purpose of Title VII was "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially[or sexually] stratified job environments to the disadvantage of minority [or female] citizens"); Int'l Bd. Of Teamsters v. United States, 431 U.S. 324, 364 (1977) (noting that "a primary objective of Title VII is . . . to achieve equal employment opportunities and to remove the barriers that have operated to favor white male employees over other employees"); *Franks v. Bowman Transp. Co*., 424 U.S. 747, 767 (1976) (explaining that the goal of Title VII was to "prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin").

[14] *See e.g., Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228 (5th Cir. 1969) (holding that the employer's policy of refusing to hire women for "switchman" positions violated Title VII); *Diaz v. Pan American*, 442 F.2d 385 (5th Cir. 1971) (holding that airline's policy against hiring men for flight attendant positions violated Title VII); *Rosenfeld v. Southern Pacific Co*., 444 F.2d 1219 (9th Cir. 1971) (holding company policy against hiring women for positions involving physically strenuous work violated Title VII); *Bowe v. Colgate-Palmolive Co*., 416 F.2d 711 (7th Cir. 1969) (holding that employer cannot bar women from all jobs requiring

takes the form of a *per se* refusal to hire women (or men) because of their sex—what I refer to as ontological discrimination.[15] The discrimination that remains is more subtle, nuanced, and often far less categorical. An employer may be perfectly willing to hire women or men but may simply refuse to hire women or men with particular traits. I refer to this as trait discrimination. Trait discrimination may be either sex-neutral or sex-specific. An employer may, for example, simply have a neutral requirement against hiring anyone with a particular trait, e.g. a pierced tongue. Alternatively, an employer may find a particular trait disqualifying only in individuals of one sex, e.g. crew cuts on women, long hair on men. Title VII analyzes sex-neutral trait discrimination using the disparate impact framework but does not provide a framework for analyzing sex-specific trait discrimination.

Once discrimination shifts from being ontological and categorical in nature to being based on more complicated interactions of traits plus sex—resulting in neither the total, nor perhaps even disproportionate, exclusion of either sex from particular jobs—it becomes far more difficult to know how to respond. Discrimination by which all women are excluded because they are women is easy to condemn, if not

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lifting of more than 35 pounds); *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273 (9th Cir. 1981) (holding that employer could not refuse to hire women for management positions dealing with foreign clients based on a concern that such clients would react negatively to dealing with a female executive). *See also Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 913 U.S. 376 (1973) (holding that newspaper could not carry help wanted ads in sex designated columns). For a discussion of the limited instances in which formally sex-based hiring continues see Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CAL. L. REV. 147 (2004).

[15] Ontology means the study of being. *See* JOHN H. KOK, PATTERNS OF THE WESTERN MIND 4 (1998); ROLLO MAY, THE DISCOVERY OF BEING: WRITINGS IN EXISTENTIAL PSYCHOLOGY 91 (19983). I use the term ontological discrimination to refer to discrimination that is status-based in the most basic sense—all women or all men are excluded because of their status as such.

to eliminate. It is clear that such discrimination violates Title VII. What is much less clear is how to treat discrimination by employers that affects only particular women (or men) rather than women (or men) as a group. Consider the employer who regularly hires women but simply refuses to hire women with short hair, or the employer who regularly hires men by simply refuses to hire men with long hair. The essential question of this paper is when, if ever, does such sex-specific trait discrimination constitute actionable sex discrimination under Title VII? [16]

My purpose is primarily positive and descriptive. Yet, the account I provide of when sex-specific discrimination is actionable is based not solely or even primarily on the text of Title VII—which is itself too sparse and indeterminate to answer this question[17]—but instead on the legislative history of Title VII's sex amendment (also concededly sparse) and the broader anti-caste goals of Title VII's sex (and race) provision(s). My argument is not, therefore, a broad normative one about the kinds of discrimination that are generally socially harmful and should be prohibited. It is, instead, one of statutory construction in which normative arguments are narrowly focused on fulfilling the law's own purposes and goals.[18]

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[16] Although this paper focuses on the appropriate treatment of sex-specific forms of trait discrimination challenged under a disparate treatment framework, in fact, as will be discussed, the same core question of when individuals should be protected in their possession of a particular trait drives the analysis of trait discrimination claims under both the disparate treatment and disparate impact analyses. *See infra* text accompanying note __.

[17] Section 703(a)(1) of Title VII makes it unlawful "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(1).

[18] This paper is part of a larger project and series of papers arguing that what antidiscrimination laws require can never be understood or defined in the abstract. What it means to not discriminate on the basis of sex can only be understood by looking at the social context in which

After framing the problem of this paper more fully by expanding upon the differences between ontological and trait-based discrimination, I assess the approaches to sex-specific trait discrimination that have been suggested by scholars and the courts. I begin with the approach that currently has the broadest support, what I call the "trait equality" approach. According to the trait equality approach, an employer engages in actionable sex discrimination anytime it penalizes an employee for possessing a trait that the employer finds unobjectionable in employees of the other sex. While the trait equality approach may at first seem simple and straightforward, it is in fact highly subjective and indeterminate. More importantly, even when viewed in its most sympathetic and workable form, a trait equality requirement is not necessary for substantive sex equality and, in practice, encourages a workplace androgyny that has high costs in terms of employee and employer liberty.

I next consider three other responses to the problem of trait discrimination. The "fundamental/immutable trait" approach prohibits sex-specific trait discrimination only when the trait in question is, or reflects the exercise of, a fundamental right—such as marital or parental status—or an immutable characteristic—such as height. The "group-identity" approach makes trait discrimination actionable only when the trait at issue is integral to the employee's identity as a member of the protected group. The "mechanism of harm" approach focuses, unlike the other approaches, not on the nature of the trait for which particular women or men are being singled out for adverse

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challenged behavior occurs and by focusing on the substantive social goals driving a particular antidiscrimination statute. Nondiscrimination, in other words, is necessarily context-based and informed by substantive social goals. *See generally* Kimberly A. Yuracko, *One for You and One for Me: Is Title IX's Sex-Based Proportionality Requirement for College Varsity Athletic Positions Defensible?* 97 NW. U. L. REV. 731 (2003); Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CAL. L. REV. 147 (2004).

treatment, but on the mechanism by which they are harmed. The mechanism of harm approach makes actionable only trait-based adverse treatment that is sexual in nature. All three approaches, while suffering from a range of different problems, suffer from the common flaw of being fatally underinclusive. All permit forms of sex-specific trait discrimination which reinforce the very sex-based work-world hierarchy that Title VII was intended to dismantle.

In the final section of the paper, I present an alternative response which I call the power/access approach. This approach treats sex-specific trait discrimination as actionable sex discrimination if the gender norms driving the discrimination are ones that society has an equality-based interest in eliminating. Consider, for example, the gender norm that makes aggressive women look bitchy. An employer may have no objection to hiring women generally but may refuse to hire aggressive women while not objecting to, and perhaps even prizing, aggressive men. Given how important aggressiveness is for business and professional success, if employers are permitted to discriminate against aggressive women, then women generally will be impaired in their ability to move up the corporate ranks and fully integrate the work world. Equality for women in the workplace requires the breakdown, or at least nonenforcement, of the gender norm associating female aggressiveness with bitchiness. Yet, not all gender norms are created equal. Not all reinforce sex hierarchy in this way and not all need to be eliminated in order for women and men to compete on equal footing in the workplace. The power/access approach makes actionable those, and only those, types of sex-specific trait discrimination that arise out of gender norms and gender scripts that reinforce sex hierarchy in the workplace. This approach cures the under and over inclusiveness problems of the other approaches by focusing squarely on Title VII's substantive goals and recognizing that what nondiscrimination means is necessarily socially contingent and context specific.

Ultimately, this paper argues that Title VII's nondiscrimination mandate requires both more and less than the formal equality and rigid neutrality that is currently argued for most often. It requires more in that it demands not only formal access to the world for women, but also a change in the social norms and gender scripts that make it more difficult for women to compete effectively in the work world. It requires less in that it does not require the elimination of, or blindness to, gender in all instances. The social transformation Title VII requires is actually more radical and more difficult than that of rigid gender-blind neutrality. It is also, however, far more appealing.

I. Ontological vs. Trait-Based Discrimination

Title VII prohibits employment discrimination that is because of an individual's sex. [19] At the most basic level Title VII makes it illegal for an employer to refuse to hire or promote women (or men) because of their status as such.[20] I refer to such status-based decision making as ontological discrimination.

Not all ontological discrimination looks the same. Efforts to exclude or disadvantage women (or men) may be motivated by different goals and effected through different mechanisms.

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[19] *See* 42 U.S.C. 2000e-2(a)(1).

[20] *See Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 662 (9th Cir. 1977) ("[T]he term sex should be given the traditional definition based on anatomical characteristics"); *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1084 (7th Cir. 2000) ("We have stated that '[t]he phrase in Title VII prohibiting discrimination based on sex' means that 'it is unlawful to discriminate against women because they are women and against men because they are men.' In other words, Congress intended the term 'sex,' to mean 'biological male or biological female'") (internal citation omitted).

Ontological Discrimination

	Motives	
	Exclusion	Satisfy Customer Preferences
Non Sexual Means	Blanket prohibition on hiring women (or men)	Sex-based hiring requirements in order to satisfy customers' preferences to work with women (men)
Mechanism		
Sexual Means	Sexual harassment of all women (or men) in workplace	Sex based hiring in order to sell customers a particular type of sexual titillation

As the figure above illustrates, sex-based ontological discrimination may most obviously be motivated by the employer's desire to exclude women (or men) from the workplace either because of animus or because of a belief that women (or men) simply do not belong in certain settings.[21] Alternatively, ontological discrimination may be motivated not by the employer's own bias but by customer preferences. An employer may engage in ontological discrimination only because such discrimination is needed to satisfy the demands of its customers.

Ontological discrimination motivated by the employer's desire to exclude may, moreover, be effected through either non sexual or sexual means. An employer

[21] The employer's desire to exclude may reflect not only the biases of owner and management, but also a desire to cater to the biases of one's workers.

may simply exercise a formal or informal policy of not hiring women (or men) to certain jobs.[22] Alternatively, an employer may attempt to exclude women (or men) by encouraging or condoning sexual harassment of all women (or men) who try to hold certain jobs.[23]

Ontological discrimination motivated by a desire to satisfy customer preferences may be effected by similar means. An employer may simply refuse to hire women (or men) because it is trying to provide a particular kind of gendered, albeit non-sexual, ambience,[24] or because its customer base is more comfortable working with women (or

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[22] *See* BARBARA F. RESKIN AND HEIDI I. HARTMANN, eds., WOMEN'S WORK, MEN'S WORK: SEX SEGREGATION ON THE JOB 47-50 (1986) (presenting numerous examples of formal discrimination against women in employment). *See also Harless v. Duck*, 619 F.2d 611, 618 (6th Cir. 1980) (describing formal policies of discrimination against women held by the Toledo, Ohio police department and in effect both before and after Title VII); *Thompson v. Boyle*, 499 F. Supp., 1147, 1150, 1161-62 (D.D.C. 1979) (describing formal practices of exclusion and segregation of women in the bookbinding industry).

[23] *See Meritor Savings Bank v. Vinson,* 477 U.S. 57, 67 (1986) ("'Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality'") (citation omitted); *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1496, 1498 (M.D. Fla. 1991) (women workers were subjected to pornography, sexual comments, physical touching and being told the men did not want to work with them); *Hall v. Gus Const. Co. Inc.*, 842 F.2d 1010 (8th Cir. 1988) (women on road construction crew targeted for harassment of sexual and non sexual nature because they were women). *See also* Carol Kleiman, *Harassment Suit at Stroh Brewery Puts Focus on Company's Own Ads*, CHI. TRIB., Mar. 9, 1992, at 6 (describing lawsuit brought by female workers at Stroh's bottling plant alleging that female workers were subjected to physical and verbal harassment of both a sexual and non sexual nature aimed at excluding women from the workplace).

[24] *See EEOC v. Joe's Stone Crab., Inc.*, 220 F.3d 1263 (11th Cir. 2000) (practice of hiring male only food servers in order to maintain restaurant's "Old World" ambience was evidence of disparate treatment discrimination in violation of Title VII)

men) in particular situations.[25] Alternatively, an employer may require that its workers provide sexual titillation to customers and hire only female or male employees accordingly.[26]

The EEOC Guidelines interpreting Title VII's prohibition on sex discrimination explicitly prohibit sex-based hiring in order to satisfy customer preferences.[27] In practice, however, discrimination of this sort is often permitted in two types of cases: those in which sex discrimination is necessary in order to protect customers' privacy interests and those in which sex discrimination is necessary in order to provide customers with sexual titillation where sexual titillation is the employer's only or

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[25] *See Diaz v. Pan Am World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971) (policy of hiring women only as flight attendants on grounds that passengers preferred female flight attendants violated Title VII); *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273 (9th Cir. 1981) (challenging employer's argument that being male was a requirement for the position of Vice President of International Operations because Latin American clients would react negatively to a woman in this position); *Olsen v. Marriott International Inc.*, 75 F. Supp.2d 1052 (1999) (challenging employer's policy of favoring female massage therapists in hiring because of customers' preferences for female over male therapists); *EEOC v. Hi Corp., Inc.*, 953 F. Supp. 301 (W.D. Mo. 1996) (involving a challenge to a weight loss center's policy of hiring only female weight loss counselors on the grounds that customers overwhelmingly preferred to work with female as opposed to male counselors).

[26] *See Wilson v. Southwest Airlines*, 517 F. Supp. 292 (N.D. Tex. 1981) (hiring only women to high customer contact positions of flight attendant and ticket agent in order to provide sexual titillation to predominately male customer base); *Guardian Capital Corp. v. New York State Division of Human Rights*, 360 N.Y.S.2d 937 (1974) (hiring only female food servers in order to provide customers with sexualized female gaze objects as well as food).

[27] The EEOC's Guidelines on Discrimination Because of Sex provide:
"(a)(1) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception . . .

(iii) The refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers . . . ."
29 C.F.R. 1604.2(a).

primary good for sale.[28] Courts permit such discrimination, and avoid Title VII's prohibition on ontological discrimination, by concluding that sex is a bona fide occupational qualification for the position at issue.[29] Notwithstanding this relatively narrow exception, however, ontological discrimination was Title VII's paradigmatic target.[30]

Sometimes, though, an employer does not seek to exclude all women or all men from a particular position but only those with particular traits or attributes. The exclusion may be sex-neutral if the employer simply refuses to hire any woman or man with a particular trait—e.g. tattoos or blue hair. The exclusion becomes sex-specific, however, if the employer enforces a hiring requirement on one sex but not the other, e.g. women may not look masculine, men may not act feminine.

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[28] For a fuller discussion of the exceptions to Title VII's prohibition on sex discrimination driven by customer preferences for privacy and sexual titillation see Yuracko, *Private Nurses and Playboy Bunnies, supra* note __.

[29] Title VII includes an exception to its general antidiscrimination mandate which permits discrimination on the basis of religion, sex, or national origin in "instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." Title VII Section 703(e)(1), 42 U.S.C. 2000e-2(e)(1)(1998).

[30] The Supreme Court in *Griggs v. Duke Power Co.,* explained:

> The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.

Griggs, 401 U.S. 424, 429-30 (1971). The Court then emphasized that "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." *Id*. at 431. *See also Sex Discrimination*, 84 HARV. L. REV. at 1170 (noting that "[t]he paradigm case of explicit sex discrimination is where sex itself, as a broad generic classification, is the sole basis of the action taken by the employer. Such a case occurs when an employer simply refuses to hire women for a certain position"); *see also supra* notes 13-14.

Sex-specific trait discrimination, like ontological discrimination, may be motivated by either an employer's own desire (stemming from animus or a sense of inappropriate fit) to exclude women or men with a particular trait, or by an employer's desire to satisfy customer preferences. Such trait discrimination may also be effected by either sexual or nonsexual mechanisms.

Sex – Specific Trait Discrimination

		Motives
	Exclusion	Satisfy Customer Preferences
Non Sexual Means	Prohibition on hiring some subgroup of women (or men)	Refusal to hire women (or men) with certain characteristics because of customer preferences
Mechanism		
Sexual Means	Sexual harassment only of women (or men) with particular characteristics	Willingness to hire only women (or men) who can provide customers with sexual titillation

An employer may, for example, believe that it is inappropriate for women with small children to be employed full-time and, therefore, may refuse to hire women with small children while being willing to hire men with small children.[31] The trait discrimination is motivated by a desire to exclude some subgroup of women because of a sense of their inappropriate fit in the workplace, and the discrimination itself is effected by nonsexual means--that is by direct prohibition. Alternatively, an employer may not like effeminate men while not minding feminine women and may condone or participate in the sexualized harassment of

[31] *See Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (involving a challenge to an employer's policy of refusing to hire women but not men with preschool age children).

such men by others in the workplace.[32] The discrimination is again motivated by a desire to exclude men of a particular type, but the means of effecting the exclusion are taunts and harassment that are sexual in nature.[33]

An employer may also engage in sex-specific trait discrimination in order to satisfy customer preferences. An employer may willingly hire men, for example, but refuse to hire men who wear dresses--while not objecting to women in dresses--because of a concern that men in dresses will alienate and offend customers.[34] Alternatively, an employer may hire women but only those whom its customers find physically and sexually appealing while imposing no similar requirements on male employees.[35]

While ontological discrimination is clearly targeted by Title VII, and has diminished significantly since its passage, the effect of Title VII on sex-specific trait discrimination is

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[32] *See Oncale v. Sundowner Offshore Services, Inc*., 523 U.S. 75 (1998) (man working on offshore oil platform was singled out and subject to sexual taunts and assaults apparently because he was perceived as insufficiently masculine); *Nichols v. Azteca Restaurant Enterprises, Inc*., 256 F.3d 864 (9th Cir. 2001) (male waiter subject to sexual harassment because he was judged to be too feminine by his male co-workers); *Doe v. City of Belleville, IL*, 119 F.3d 563 (1997) (teenage brothers singled out for sexual harassment by male co-workers because of their perceived effeminacy), *vacated by* 523 U.S 1001 (1998).

[33] It is worth noting that cases of sexual harassment may involve either ontological or trait-based discrimination.

[34] *See e.g., Oiler v. Winn-Dixie Louisiana, Inc*., 2002 WL 31098541 (E.D. La. Sept. 16, 2002) (terminating male delivery truck driver who sometimes dressed and appeared in public as a woman during his off duty hours on the grounds that employer's customers would not approve of such behavior).

[35] *See e.g., Gerdom v. Continental Airlines*, 692 F.2d 602 (9th Cir. 1982) (involving a challenge to an airline policy of imposing strict weight requirements on female flight attendants as a condition of their employment because the employer sought to compete in industry by featuring attractive female attendants); *Laffey v. Northwest Airlines, Inc*., 366 F. Supp. 763 (D.C.D.C. 1973) (involving a challenge to an employer policy of imposing weight requirements and no eyeglass policy on female but not male flight attendants).

more uncertain. Courts and scholars have struggled to decide whether, and if so when, sex-specific trait discrimination violates Title VII's nondiscrimination mandate.

II. Trait Equality Approach

Currently, the dominant response to sex-specific trait discrimination is to argue that women should be permitted to possess any trait or attribute that men are permitted to possess in the workplace, and vice versa. It is sex discrimination, the argument goes, for individuals of one sex to be disadvantaged for engaging in an activity or possessing an attribute that the employer deems perfectly acceptable when possessed or engaged in by individuals of the other sex. In this section I describe the scholarly and judicial support for this approach before emphasizing its conceptual and normative weaknesses.

A. Scholarly Support

Mary Anne Case has provided the strongest and most articulate defense of the trait equality approach.[36] According to Case, trait equality both already is, and should be, demanded by antidiscrimination law.[37] Just as women are protected under Title VII from adverse employment actions when they adopt the traits and attributes that are considered acceptable (or desirable, or required) in men, so too must men be protected when they adopt traits and attributes that are considered acceptable in women.[38] According to Case,

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[36] *See* Mary Anne Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L. J. 1, 7 (1995). Case herself, however, does not use this phrase.

[37] Case contends that effeminate men "as well as . . . men who violate sex-specific grooming codes by wearing feminine attire to work . . . are clearly protected by both the plain language of Title VII and the holding in *Hopkins*. If their employer tolerates feminine behavior or attire in women but not in them, the employer is subjecting them to disparate treatment in violation of Title VII." Id. at 7. Case, *supra* note __ at 7.

[38] *See* Case, *supra* note __ at 49.

"one need not go beyond the plain language of [Title VII] to find explicit protection for [the] . . . hypothetical 'male employee who routinely appeared for work in skirts and dresses,' at least if the skirts and dresses were of a sort the employer did not object to its female employees wearing.'"[39]

Case, somewhat hopefully, views the trait equality approach as a means of elevating that which has been traditionally feminine.[40] "It is my contention," she explains, "that, unfortunately, the world will not be safe for women in frilly pink dresses—they will not, for example, generally be as respected as either men or women in gray flannel suits—unless and until it is made safe for men in dresses as well."[41] Case's desire to elevate the feminine, as opposed to simply elevating and protecting women, is odd given that Case both clearly sees the feminine as distinct from femaleness and also seems to have no independent attachment to the feminine *per se*.[42] Indeed, Case says: "I would be neither particularly surprised nor particularly disappointed if masculinity and femininity as we today define them were to be amalgamated, to be diversified, or to wither away in future generations."[43] Perhaps more odd, however, is her optimism in the trait equality approach as a mechanism for such elevation. As Case notes, the trait equality approach does not itself require employers to permit men to wear

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[39] Case, *supra* note __ at 49.

[40] *See* Case, *supra* note __ at 3 ("We are in danger of substituting for prohibited sex discrimination a still acceptable gender discrimination, that is to say, discrimination against the stereotypically feminine, especially when manifested by men, but also when manifested by women").

[41] *Id*. at 7.

[42] According to Case, "it is important to those feminists who wish to see feminine styles more generally valued, rather than gradually eliminated as they may be in an androgynous culture slanted toward the masculine, that the protections of Title VII be seen as extending even to men in dresses." *Id*. at 7.

[43] *Id.* at 76. Indeed, Case explains that she worries "about two sorts of potential gender essentialism—not merely the essentializing of women as feminine, but the essentializing of the feminine itself." *Id.* at 76

frilly pink dresses to work, it only requires that if the employer allows women to wear such outfits it must allow men to do so as well.[44] It is highly uncertain, as Case acknowledges, that employers bound by the strictures of the trait equality approach would respond by expanding the clothing and grooming options available to both sexes rather than prohibiting everyone from wearing pink frilly dresses.[45] However, even if employers were to respond to a trait equality requirement by making gendered clothing and grooming styles options for both sexes, it remains far from clear that doing so would serve to elevate the traditionally feminine as opposed to increasing its marginalization by linking in the workplace stereotypically feminine women and men in drag. Nonetheless, despite her perhaps overly optimistic instrumental hopes for the trait equality approach, Case views the approach as clearly mandated by Title VII.

Taylor Flynn, too, argues in favor of a trait equality approach to sex discrimination and interprets it in a similarly literalistic way.[46] Flynn contends that "a male employee fired for wearing an earring should have a claim under Title VII because he was discriminated against for failing to conform to the masculine gender role expectation that men do not accessorize."[47] Flynn sees gender nonconformity as at the core of both sex and sexual orientation discrimination and sees the trait equality

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[44] *Id*. at 7-8.

[45] Case "acknowledge[s] the risks in insisting that employers impose the same grooming standards on men and women: Haunted by the specter of a man in a dress, employers may choose to impose a unisex, conventionally masculine grooming code on all employees; this would not only further reduce employee liberty but also further reinforce the supremacy of masculine standards and the decline of the feminine." *Id* at 7-8.

[46] *See* Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 COLUM. L. REV. 392, 394 (2002).

[47] *Id.* at 401.

requirement, again perhaps too optimistically, as a way to free gender nonconformists from traditional gender expectations. [48]

B. Case Law

The trait equality approach has also been popular with courts, but only up to a point. The approach has been used by courts to target discrimination against masculine women and effeminate men. Courts have been largely unwilling, however, to use the approach as a means of targeting employment discrimination based on sexual orientation or that based on male cross-dressing.

1. Aggressive/Masculine Women

The trait equality approach was most clearly articulated by the Supreme Court in *Price Waterhouse v. Hopkins*.[49] Ann Hopkins had worked in the Washington D.C. office of Price Waterhouse for five years when the partners in that office proposed her for partnership in 1982.[50] Hopkins was one of 88 persons proposed for partnership that year and the only woman.[51] The district court judge who initially heard Hopkins' case found that "'[n]one of the other partnership candidates at Price Waterhouse that year had a comparable record in terms of successfully securing major contracts for the partnership.'"[52] Nevertheless,

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[48] *Id*. at 393. Katherine Franke, has made a similar argument that gender role enforcement is at the core of sex discrimination and should, therefore, be the focus of Title VII. According to Franke, "Title VII should recognize the primacy of gender norms as the root of both sexual identity and sex discrimination, and thereby the law should prohibit all forms of normative gender stereotyping regardless of the biological sex of any of the parties involved." Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U.PA. L. REV. 1, 95 (1995).

[49] 490 U.S. 228 (1989).

[50] 490 U.S. at 233.

[51] 490 U.S. at 233. At the time Hopkins was considered for partner, Price Waterhouse had 662 partners of whom 7 were women. *Id*.

[52] 490 U.S. at 234, quoting district court opinion at 618 F. Supp. at 1112.

Hopkins was passed over for partnership and held for reconsideration the following year.[53]

The man who was assigned by Price Waterhouse to tell Hopkins why her candidacy had been held over provided her with several suggestions for improving her chances the following year. He told her she should "'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry,'"[54] After the partners in her office refused to re-propose her for the partnership, Hopkins sued alleging that she had been discriminated against because of her sex in violation of Title VII.[55]

In deciding the case, the Supreme Court made clear that it was actionable sex discrimination in violation of Title VII to penalize an employee for possessing traits or attributes that would have been acceptable in individuals of the other sex. The Court held that "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."[56] The Supreme Court described its holding in *Price Waterhouse* as reinforcing Title VII's prohibition on "gender stereotyping," and the Court had no difficulty concluding

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[53] Of the 88 people proposed for partnership that year, forty seven were admitted to the partnership, twenty one were rejected and twenty were held for reconsideration the following year. *Id.* at 233.

[54] 490 U.S. at 235. As part of the partnership consideration process, several partners at Price Waterhouse submitted comments regarding Hopkins' candidacy. Several of these comments also touched on Hopkins's apparent gender inappropriateness. "One partner described her as 'macho'; another suggested that she 'overcompensated for being a woman'; a third advised her to take 'a course at charm school.' Several partners criticized her use of profanity; in response, one partner suggested that those partners objected to her swearing only 'because it's a lady using foul language.' Another supporter explained that Hopkins 'ha[d] matured from a tough-talking somewhat masculine hard-nosed mgr to an authoritative, formidable, but much more appealing lady ptr candidate.'" *Id.* at 235, *internal citations omitted*.

[55] 490 U.S. at 232.

[56] 490 U.S. at 250.

that such impermissible gender stereotyping had occurred in this case.[57]

Despite the Supreme Court's characterization of its holding as prohibiting gender stereotyping, it is more precise and more accurate to describe the holding as endorsing a trait equality requirement. The term gender stereotyping has been used by courts to refer to and prohibit very distinct kinds of biases. Gender stereotyping sometimes refers to the erroneous attribution of traits and attributes to a particular individual because of that person's membership in a particular social group. For example, gender stereotyping may refer to the process by which one assumes that a particular woman is physically weak, uncommitted to her career in the long term, or emotionally vulnerable, because these are attributes associated with women as a group.[58] Courts have, in the employment context and in other contexts, repeatedly prohibited gender stereotyping of this sort.[59] The gender stereotyping the

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[57] According to the Court, "It takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring 'a course at charm school.' Nor, ...does it require expertise in psychology to know that, if an employee's flawed 'interpersonal skills' can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism." 490 U.S. at 256.

[58] *See e.g., Grube v. Lau Industries, Inc.*, 257 F.3d 723, 729 (7th Cir. 2001) (noting that it is a gender stereotype to assume that women should be the primary caregivers in their families); *Healey v. Southwood Psychiatric Hosp.*, 78 F.3d 128, 134 (3rd Cir. 1996) (noting that historical restrictions on women's ability to hold certain jobs arising from employers' concern for women's health and well-being were often based on gender stereotypes); *Lindahl v. Air France*, 930 F.2d 1434 (9th Cir. 1991) (noting that employer's evaluation of job candidates' leadership abilities reflected gender stereotyped notions about the characteristics likely possessed by women and men).

[59] *See e.g., Frontiero v. Richardson*, 411 U.S. 677 (1973) (striking down a federal statute providing dependent benefits for spouses of male service members but providing the same benefits to the spouses of female service members only upon their showing actual dependence for over one-half their support); *Sprogis v. United Air Lines*, 444 F.2d 1194, 1198-99

Court prohibited in *Price Waterhouse* is, however, entirely different. It involves not the erroneous attribution of group-associated traits to individual group members, but the requirement that individuals actually possess the traits and attributes deemed acceptable for their sex rather than those deemed acceptable and appropriate for the other sex. Referring to a prohibition of this latter type of gender stereotyping as a trait equality requirement helps to clarify which distinct type of "stereotyping" is in fact at issue.[60]

Additionally, "gender stereotyping" does not fully capture what the Court found problematic about the decision making in *Price Waterhouse*. Although the Supreme Court boldly stated that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotypes associated with their groups,"[61] the conduct the Supreme Court was prohibiting was more narrowly defined than this statement suggests. It is unlikely, for example, that the Court meant that a bank could not fire a teller who showed up to work in a Barney costume on the grounds that doing so discriminated against the employee for not matching the stereotypes of proper dress associated with her sex. The Court was not intending to hold that adverse employment action based on any conduct that deviated from gender stereotypes constituted sex-based discrimination. Rather, the Court intended to protect individuals from adverse employment actions resulting from their possession of attributes that would be acceptable to the employer if possessed by individuals of the other sex. Again, although

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(7th Cir. 1971) (striking down the employer's no marriage rule for female but not male flight personnel because based on sex stereotypes about women's domestic role); *Reed v. Reed*, 404 U.S. 71 (1971) (striking down a state law which, all else being equal, chose men over women to be estate executors).

[60] For a fuller discussion of different types of stereotyping see Andrew Koppelman, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 131-36 (1996).

[61] 490 U.S. at 251.

the Supreme Court in *Price Waterhouse* said it was prohibiting gender stereotyping, the decision is better thought of as an articulation of a trait equality requirement.

Lower courts have used *Price Waterhouse* to provide Title VII protection to similarly non gender conforming women. In *Heller v. Columbia Edgwater Country Club*,[62] for example, the plaintiff was subjected to a constant barrage of insults focused on her perceived gender inappropriate clothing and her lesbianism. Applying the logic of trait equality, the court concluded that the harassment Heller suffered because of her masculine traits and appearance constituted discrimination because of sex.[63]

2. Effeminate Men

The trait equality approach has had its greatest impact, however, not in protecting aggressive/masculine women but in protecting effeminate men singled out for harassment by other men in mixed sex or predominately male environments. Oddly, nowhere in the Supreme Court's 1997 decision in *Oncale v. Sundowner Offshore Services*,[64] in which it held that same-sex sexual harassment could be actionable under Title VII, did the Court rely on or even mention the gender stereotyping/trait equality approach to sex discrimination outlined in *Price Waterhouse*.

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[62] *See Heller v. Columbia Edgewater Country Club*, 195 F. Supp.2d 1212 (D. Or. 2002).

[63] According to the court: "Viewing the evidence in the light most favorable to the plaintiff, a jury could find that Cagle repeatedly harassed (and ultimately discharged) Heller because Heller did not conform to Cagle's stereotype of how a woman ought to behave. . . . [T]he impetus for the comments about Heller's 'faggy' shoes was that Cagle perceived them to be men's shoes. Cagle also allegedly made a number of comments along the lines of 'I thought you were the man,' 'I thought you wore the pants,' and asked Heller who 'w[ore] the dick in the relationship.'" *Heller*, 195 F. Supp.2d at 1224. The court also took the unusual step of extending the trait equality logic to find actionable harassment Heller suffered because of her lesbianism. *Id.* at __. *See text accompanying note* 79.

[64] *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1997).

The Court in *Oncale* offered three "evidentiary route[s]"[65] by which a plaintiff could show that he was discriminated against because of sex: first, the plaintiff could show that the same-sex harassment was motivated by sexual desire and therefore presumably would not have happened to someone of the other sex; second, the plaintiff could show that the harasser was motivated by general hostility to persons of plaintiff's sex in the workplace; or third, the plaintiff could offer direct comparative evidence showing that the harasser treated women and men differently in a mixed-sex workplace. While the Supreme Court did not mention the gender stereotyping/trait equality rationale of *Price Waterhouse* as a means of finding same sex harassment actionable, nor did it refute this approach. As a result, courts continue to apply this approach in order to find at least some male-male harassment actionable under Title VII.[66]

In *Nichols v. Azteca Restaurant Enterprises, Inc.*,[67] for example, the Ninth Circuit applied the trait equality approach to conclude that abuse the plaintiff suffered constituted actionable sex discrimination under Title VII. Antonio Sanchez worked as a host and then food server at Azteca restaurants in Washington state. During his four year tenure at Azteca, Sanchez was subjected to a steady

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[65] *Id*. at 81.

[66] The reconciling of *Oncale* and *Price Waterhouse* by the Third Circuit in *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, is fairly standard. According to the Third Circuit, "[a]bsent an explicit statement from the Supreme Court that it is turning its back on *Price Waterhouse*, there is no reason to believe" that the *Oncale* decision was meant to call the gender stereotyping/trait equality theory of sex discrimination into question. *Id.* at 263 n.5. *But see* David S. Schwartz, *When is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1743 (2002) ("In light of all the ways that a sex-stereotyping theory should have come to the Court's attention, the complete failure of the *Oncale* opinion to address the sex-stereotyping theory of harassment, along with its failure to identify sex-stereotyping as an "evidentiary route" for proving "because of sex," is notable and disturbing.").

[67] 256 F.3d 864 (9th Cir. 2001).

stream of taunts and insults focusing on his perceived effeminacy.[68] At a bench trial, the district court judge held that the harassment Sanchez allegedly suffered had not been "because of" sex within the meaning of Title VII. The Court of Appeals disagreed. According to the court, "[a]t its essence, the systematic abuse directed at Sanchez reflected a belief that Sanchez did not act as a man should act."[69] Relying on *Price Waterhouse*, the court concluded that such abuse—based as it was on the perception that Sanchez possessed traits and attributes that while acceptable for a woman were inappropriate for a man—constituted harassment "because of" sex.[70]

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[68] According to the court, " [m]ale co-workers and a supervisor repeatedly referred to Sanchez in Spanish and English as 'she' and 'her.' Male co-workers mocked Sanchez for walking and carrying his serving tray 'like a woman,' and taunted him in Spanish and English as, among other things, a 'faggot' and a 'fucking female whore.'" *Nichols*, 256 F.3d at 870.

[69] *Nichols*, 256 F.3d 874.

[70] *Nichols*, 256 F.3d at 875. The Ninth Circuit faced a similar case one year later in *Rene v. MGM Grand Hotel, Inc*., 305 F.3d 1061 (9th Cir. 2002) (en banc). Medina Rene worked as a butler on an exclusive floor of the MGM Grand Hotel reserved for wealthy and famous guests. All of the other butlers on the floor were male. Rene was subjected to a constant stream of abuse from his supervisor and fellow butlers. The conduct included "whistling and blowing kisses at Rene, calling him 'sweetheart' and 'munea' (Spanish for 'doll'), telling crude jokes and giving sexually oriented 'joke' gifts, and forcing Rene to look at pictures of naked men having sex." *Id*. at 1064. The abuse was also often physical. Rene was "caressed and hugged," his co-workers would "'touch [his] body like they would to a woman,'" and "they grabbed him in the crotch and poked their fingers in his anus through his clothing." *Id*. at 1064. In an en banc decision the court held that Rene had stated a claim for sexual harassment in violation of Title VII. In a plurality opinion of the court, Judge Fletcher (joined by Judges Trott, Graver and Fisher), concluded that the alleged harassment was "because of" sex because of the sexual nature of the abuse. *Id*. at 1066-68. In a concurring opinion Judge Pregerson (joined by judges Trott and Berzon), reached the same result for different reasons. According to Pregerson, the case was better understood as a gender stereotyping case in which Rene was harassed

Similarly, in *Doe v. City of Belleville*,[71] the Seventh Circuit ruled that the harassment of two boys who were perceived by their male co-workers as insufficiently masculine constituted sex discrimination under Title VII. [72] *City of Belleville* involved the harassment of two sixteen year old brothers working for the City for the summer tending the grounds of a municipal cemetery. Both brothers were subjected to taunts and abuse by their male co-workers, but one of the brothers, H. Doe, was the main target. [73] The

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because he had traits that were deemed appropriate for a woman but not a man. *Id*. at 1068-69.

[71] *Doe v. City of Belleville, IL.*,119 F.3d 563 (7th Cir. 1997). The Seventh Circuit's opinion in Belleville was vacated by the Supreme Court for further consideration in light of its decision in *Oncale v. Sundowner Offshore Services*. The case then settled before there was a decision on remand. *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 263 n.5 (3rd Cir. 2001). The Supreme Court's decision in *Oncale* did not, however, directly challenge or retract the gender stereotyping logic set forth in *Price Waterhouse* on which the *Belleville* decision relied. *See id*. (opining that "there was nothing in Oncale, . . . that would call into question" the holding in *Belleville* that harassment based on failure to live up to gender stereotypes was sex discrimination).

[72] The Circuit Court noted: "The Supreme Court's decision in *Price Waterhouse v. Hopkins*, . . . makes clear that Title VII does not permit an employee to be treated adversely because his or her appearance or conduct does not conform to stereotypical gender roles." *Belleville*, 119 F.3d at 580. The court also suggested, however, that an alternative and independent ground for its conclusion that the harassment in that case was "because of" sex was the simple fact that the harassment of H. was explicitly sexual in nature. *Id*. at 576-580. It is this suggestion that the Supreme Court explicitly rejects in *Oncale*. *See Oncale*, 523 U.S. at 80 ("We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations").

[73] The court noted that the parties had focused most of their attention on the harassment suffered by H. Doe rather than that suffered by his brother J. Doe, and that it was the harassment suffered by H. "that most vividly illustrates why same-sex harassment is actionable as sex discrimination." *Belleville*, 119 F.3d at 569. However, because both the parties and the district court addressed the Does' claims collectively and the city "made no meaningful effort to distinguish J. Doe's claims from

harassment of H. focused primarily on the fact that he wore an earring and was perceived as overly feminine.[74] In concluding that the plaintiffs had presented evidence sufficient to show that they had been harassed "because of" sex, the Seventh Circuit relied directly on the Supreme Court's gender stereotyping/trait equality rationale from *Price Waterhouse*. The court explained that "a man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers' idea of how men are to appear and behave is harassed 'because of' his sex."[75]

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his brother's," the court concluded that both brothers were entitled to a trial on their sex discrimination claims. *Id*. at 569.

[74] Most of the abuse H. suffered was at the hands of one co-worker Jeff Dawe, a former Marine. Dawe "constantly referred to H. as 'queer' and 'fag' and urged H. to "go back to San Francisco with the rest of the queers.' Dawe also repeatedly inquired of H., 'Are you a boy or a girl?' Dawe soon took to calling H. his 'bitch' and said that he was going to take him 'out to the woods' and 'get [him] up the ass.'" *Belleville*, 119 F.3d at 567. On one occasion Dawe walked toward H. saying "'I'm going to finally find out if you are a girl or a guy.'" *Id.* at 567. Dawe then grabbed H. by the testicles and announced, "'Well, I guess he's a guy.'" *Id*. at 567.

[75] *Belleville*, 119 F.3d at 581. Several other circuits have also noted in dicta that Title VII requires trait equality. *See e.g., Bibby*, 260 F.3d at 262 (noting that "a plaintiff may be able to prove that same-sex harassment was discrimination because of sex by presenting evidence that the harasser's conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender"); *Simonton v. Runyon*, 232 F.3d 33, 28 (stating that "[t]he Court in *Price Waterhouse* implied that a suit alleging harassment or disparate treatment based upon non conformity with sexual stereotypes is cognizable under Title VII as discrimination because of sex"); *Higgins v. New Balance Athletic Shoe, Inc*., 194 F.3d 252 (1st Cir. 1999) (explaining that "just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity."). *See also Martin v. New York State Dept. of Correctional Services*, 224 F. Supp.2d 434, 447 (N.D. N.Y. 2002) (recognizing sex stereotyping as a form of sex

A Massachusetts district court applied the same analysis in *Centola vs. Potter*.[76] Stephen Centola worked as a letter carrier for the Postal Service for over seven years. During his employment he was subjected to "constant" sexually derogatory comments and jokes, most of which seemed related to his perceived effeminacy and homosexuality.[77] In denying the defendant's motion for summary judgment, the court held that the plaintiff had presented sufficient evidence of sex discrimination by showing that his co-workers "punished him because they perceived him to be impermissibly feminine for a man."[78]

Despite courts' use of the trait equality approach as a means of providing Title VII protection to effeminate men, courts have, by and large, not used the trait equality approach to prohibit discrimination against employees who engage in same-sex sexual relations or that against men who

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discrimination but finding that the plaintiff did not present any evidence showing that he was or was perceived by his co-workers to be effeminate); *Ianetta v. Putnam Investments, Inc.*, 142 F. Supp.2d 131 (D. Mass. 2001) (finding that plaintiff had stated a cause of action under Title VII where he alleged that he was discriminated against because he did not conform to the male gender stereotype).

[76] 183 F. Supp.2d 403 (D. Mass. 2002).

[77] Although Centola was gay, according to the court, "he never disclosed his sexual orientation to any of his co-workers or managers." *Centola*, 183 F.Supp.2d at 407. The court described the harassment endured by Centola as follows: "On one occasion, Centola's co-workers placed a sign stating 'Heterosexual replacement on Duty' at his case [work space]. Co-workers taped pictures of Richard Simmons 'in pink hot pants' to Centola's case. Fellow carriers asked Centola if he would be marching in a gay parade and asked him if he had gotten AIDS yet. At other times, his co-workers called him a 'sword swallower' and anti-gay epithets. His co-workers also placed cartoons mocking gay men at his case." *Id.* at 407 (internal citations omitted).

[78] The court concluded that a reasonable jury could conclude that "Centola's co-workers harassed him because Centola did not conform with their ideas about what 'real' men should look or act like. Just as Ann Hopkins was vilified for not being 'feminine' enough, Centola was vilified for not being more 'manly.'" *Id*. at 410.

wear women's clothing.[79] The Ninth Circuit's decision in *Belleville* is typical. While endorsing the trait equality approach as a way to find discrimination based on male effeminacy actionable under Title VII, the court, nevertheless, concluded that Title VII did not prohibit discrimination based on sexual orientation.[80]

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[79] *See e.g.*, Case, *supra* note __; Taylor, *supra* note __; David S. Schwartz, *When is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1773-74 (2002) ("Embracing a sex-stereotyping theory in a same-sex harassment case would be tantamount to extending Title VII harassment protection to lesbians, gays, and gender nonconformists. Such discrimination is inevitably based on the perception that the target of the discrimination has failed to adopt behavior—gender or sexual behavior—deemed suitable to his or her sex, and is therefore discrimination 'because of . . . sex' under a plain language reading of Title VII"); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of 'Sex,' 'Gender,' and 'Sexual Orientation' in Euro-American Law and Society*, 83 CAL. L. REV. 1, 125-26 (1995) ("[W]hile sex and gender discrimination are formally illegal and sexual orientation discrimination is not, it is impossible (by conflationary definition) to practice 'sexual orientation' discrimination without also and simultaneously committing sex and gender discrimination"); Catharine A. MacKinnon for National Organization on Male Sexual Victimization, et al., United States Supreme Court Amicus Brief in *Oncale v. Sundowner Services*, in support of Oncale, 1997 WL 471814 *28 ("When individuals are sexually harassed because of the sex of their sexual partners, real or imagined, they are harassed because of sex. First, formally speaking, those harassed because they are gay men or lesbian women are harassed because of the gender of their sexual partners and identification. If their own gender, or that of their loved ones, were different, they would not be so treated"); ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 154-58 (1996) (using trait equality logic to argue that sexual orientation discrimination is a form of sex discrimination).

[80] *See Belleville*, 119 F.3d at 593 (endorsing the trait equality/gender stereotyping logic of *Price Waterhouse* but noting that "[t]he courts have widely agreed that discrimination based on sexual orientation (actual or perceived), as opposed to sex, is beyond the purview of Title VII"). Courts generally seem bolstered by Congress's express refusal to extend Title VII protection to discrimination based on sexual orientation. *See e.g. Oiler*, 2002 WL 31098541 at *4 n. 53 (listing the thirty one proposed bills introduced into the U.S. Senate and House of Representatives between 1981-2001which have "attempted to amend Title VII and prohibit

Courts likewise have refused to use trait equality logic as a means of prohibiting discrimination against male cross-dressers.[81] In *Nichols,* for example, the Ninth Circuit,

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employment discrimination on the basis of affectional or sexual orientation," and emphasizing that none of them have passed). *See also Simonton*, 232 F.3d at 35,38 (noting in dicta that Title VII does prohibit discrimination based on nonconformity with sexual stereotypes but emphasizing that "[t]he law is well-settled in this circuit and in all others to have reached the question that . . . Title VII does not prohibit harassment or discrimination because of sexual orientation"); *Spearman,* 231 F.3d at 1085-86 (recognizing that "sex stereotyping may constitute evidence of sex discrimination" but emphasizing that Title VII "does not prohibit harassment in general or of one's homosexuality in particular"); *Bibby*, 260 F.3d at 264-65 (affirming grant of summary judgment to defendants because Title VII protects against discrimination based upon gender stereotypes but not against discrimination based on sexual orientation); *Martin v. New York State Dept. of Correctional Services*, 224 F. Supp.2d 434, 446 (N.D. N.Y. 2002) (granting defendant's motion for summary judgment on grounds that plaintiff was unable to show the harassment he suffered was because of his nonconformity with sex stereotypes rather than because of his sexual orientation which is not protected under Title VII).

There have, however, been rare exceptions to this unwillingness to use trait equality logic to prohibit discrimination based on sexual orientation. *See e.g., Centola v. Potter*, 183 F.Supp.2d at 410 (suggesting that the trait equality logic used to find Title VII protection for men discriminated against because of their effeminacy should also provide protection for men discriminated against because they choose to date men instead of women); *Heller*, 195 F. Supp.2d at 1223 (concluding that harassment because of plaintiff's lesbianism as well as harassment because of her perceived masculinity was actionable discrimination because of sex).

[81] *See e.g., Oiler*, 2002 WL 31098541 (granting defendant's motion for summary judgment on grounds that male employee who was terminated for dressing and acting like a woman during off work hours was not discriminated against because of sex); *Dobre v. National Railroad Passenger Corporation,* 850 F. Supp. 284 (E.D. Pa. 1993) (holding that plaintiff, a male to female transsexual, who claimed she was discriminated against by, among other things, being forced to dress as a man, could not state a claim for sex discrimination); *Tavora v. New York Mercantile Exchange*, 101 F.3d 907 (2d Cir. 1996) (holding that it did not violate Title VII for an employer to require male employees to have short hair but imposing no similar restriction on female employees); *Lockart v.*

while holding that harassment of an effeminate man constituted sex discrimination, emphasized the limits of its holding: "We do not imply that all gender-based distinctions are actionable under Title VII. For example, our decision does not imply that there is any violation of Title VII occasioned by reasonable regulations that require male and female employees to conform to different dress and grooming standards."[82] The Supreme Court too suggested in *Oncale* that its trait equality logic does not extend this far.[83]

Louisiana-Pac. Corp., 795 P.2d 602, 604 (Or. Ct. App. 1990) (holding that it did not constitute sex discrimination under Oregon law for an employer to fire a man for wearing an earring when female employees were permitted to do the same thing); *Willingham v. Macon Tel. Pub. Co.*, 507 F.2d 1084 (5th Cir. 1975) (holding that company policy prohibiting long hair for male employees but not for female employees did not violate Title VII). *But see Aros v. McDonnell Douglas Corp.*, 348 F. Supp. 661 (D.C. Cal. 1972) (dress and grooming code constitutes sexual discrimination when applied differently to males and females); *Donohue v. Shoe Corp. of America*, 337 F. Supp. 1357 (D.C. Cal. 1972) (rule requiring short hair on men but not on women violated Title VII); *Roberts v. General Mills, Inc.*, 337 F. Supp. 1055 (D.C. Ohio 1971) (rule allowing female employees to wear hairnets but requiring male employees to wear hats—and therefore keep their hair short—constituted sex discrimination).

[82] *Nichols*, 256 F.3d at 874-75 (finding that the plaintiff was harassed for not acting "as a man should act" and for having "feminine mannerisms" and concluding that such harassment was "because of sex.").

[83] The Supreme Court in *Oncale* noted that "[t]he prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace." 523 U.S. at 81. Courts, however, may be somewhat more willing to apply the trait equality logic to clothing and grooming cases outside of the employment context. In *Rosa v. Park West Bank & Trust Co.*, for example, a bank employee refused to give Lucas Rosa a loan application because he was wearing a dress. She told him she would not provide him with a loan application until he changed into more gender appropriate clothes. 214 F.3d 213, 214 (1st Cir. 2000). Rosa sued under the Equal Credit Opportunity Act alleging sex discrimination. The Court of Appeals in reversing the district court's dismissal of Rosa's claim held that he had stated a cause of action for sex discrimination based on failure to satisfy gender stereotypes. In recognizing Rosa' claim the court explained: "It is reasonable to infer that [the bank employee] told [Rosa] to go home and change because she

C. Problems with the Trait Equality Approach

Despite its rhetorical appeal, the trait equality approach suffers from two weaknesses as a response to the question of when sex-specific trait discrimination should be actionable sex discrimination. As will become clear shortly, the problems in fact map onto two distinct conceptions of the trait equality approach. First, because true or pure cross-sex trait equality can never exist, a finding of discrimination under this approach in fact relies on contested and controversial naming and framing choices. In a gendered society, women and men simply cannot possess the same trait in precisely the same way. This fact of substantive trait inequality undermines the most basic conception of and justification for the trait equality approach--that like must be treated alike. It also, however, undermines the seemingly simple rule-like nature of the approach. Because of the lack of real cross-sex trait parallels, determining when trait equality is met or violated becomes in effect an indeterminate nominalism game whose outcome depends on how one names the trait at issue and frames the cross sex comparison. The trait equality approach itself offers no guidance on these questions. Second, the trait equality approach mistakenly equates nondiscrimination with formal neutrality and the nonenforcement of all gender norms. The trait equality approach becomes more coherent and useful to the extent one understands it as grounded not on the idea that like must be treated alike but instead on the assertion that differences created by gender norms are illegitimate. Yet, trait equality's requirement of rigid gender-blind neutrality is neither necessary for substantive sex equality nor otherwise normatively desirable.

1. The Problem of Indeterminance

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thought that [his] attire did not accord with his male gender . . ." *Id*. at 215-16.

To the extent that the trait equality approach is based on the idea that like must be treated alike, the approach is undermined by the fact that women and men never possess exactly the same traits in exactly the same way. Given this fact, findings of discrimination become, in effect, the product of indeterminate nominalism choices: how does one name the trait at issue and frame the appropriate (approximate) cross sex comparison. In this section I will move from examples in which the problem with cross sex trait parallelism is clear to those in which the problem is more subtle in order to highlight the impossibility in all cases of true trait equality. In addition, I will show, with each set of examples, how contested nominalism questions determine findings of discrimination under this approach.

a. Biological Traits

The impossibility of women and men possessing the same trait is most apparent in cases in which the trait at issue is a biological one which simply cannot be possessed by individuals of the opposite sex. In such cases, true trait equality and theoretically pure cross sex comparisons are clearly not possible. Findings of discrimination, therefore, necessarily depend upon how one frames the (approximate) cross sex comparison.

Consider first the hypothetical case of an employer who happily hires both women and men but refuses to hire women with high-pitched voices. The employer has no problem hiring or promoting women; the employer simply finds female high-pitched voices grating and so refuses to hire women with such voices.

In order to determine whether the adverse treatment a woman with a high-pitched voice suffers is sex discrimination, the trait equality approach requires comparing her treatment to that of a man with the same trait. Men, though, will not possess the very same trait. Some men may possess high-pitched male voices but none

will possess a high-pitched female voice.[84] It is not possible, therefore, to assert the high-voiced woman's sex discrimination claim by pointing to the employer's different treatment of men with the very same attribute.

Applying the trait equality approach in practice necessarily requires loosening the comparison. One might, for example, name the trait for which the woman was fired as a voice that was unexpectedly or unusually high-pitched and then compare her treatment to that of men who also had unexpectedly or unusually high pitched voices. One could, in other words, try to show that the employer treated women with high-pitched voices worse than it treated men with high-pitched voices and violated the (pragmatic) mandate of trait equality in this way.

It is not at all clear, however, that naming the trait at issue and framing the cross sex comparison in this way makes sense. Unusually high-pitched female voices really are different from unusually high-pitched male voices both in tone and effect, and it may be that only the former give the employer a headache.[85] De-sexing and re-naming the

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[84] Women's and men's voices differ not only in pitch but in a number of other aspects stemming from anatomical differences between them. *See* Ronald C. Scherer, *A Basic Overview of Voice Production*, at www.voicefoundation.org/VFScherervoiceprod.html (explaining that "[t]he voices of women and men differ relative to a number of aspects including larynx size, speaking pitch, pitch range, the space between the vocal folds, and the incidence of voice problems). Indeed, producing plausible female voices remains a significant problem for male-to-female transsexuals. *See* Kerstin Neumann, et al., *Cricothyroidopopexy in Male-to female-Transsexuals*, 6 INTERNATIONAL JOURNAL OF TRANSGENDERISM (2002), available online at www.symposion.com/ijt/ijtvo06no03_oh.htm, (explaining that "[t]he secondary sex characteristic of the larynx with its vocal function remains a major obstacle to male-to-female transsexuals 'passing' as female"); Susan D. Clark, *To Sound Like a Woman*, GENDYS Conference 1998, available online at www.gender.org.uk/conf/1998/clark.htm (providing therapeutic techniques to assist male-to-female transsexuals in developing female voices).

[85] To the extent that the employer's prohibition on high voices can be characterized as a neutral requirement that workers have voices that are

trait at issue for the woman with the high-pitched voice may enable a cross sex comparison, but it may also fundamentally distort the trait for which the woman is actually being disadvantaged.

Problems stemming from the lack of true cross sex trait equality have been most obvious and acute in courts' analysis of sex discrimination claims based on pregnancy. Pregnancy, like the high-pitched female voice, has no identical cross sex parallel--men cannot become pregnant. Under a rigid (yet theoretically pure) application of trait equality logic, therefore, pregnancy discrimination would never constitute sex discrimination. Because a pregnant woman could never show that she was being treated worse than a man with the (precise) same trait, she could never show that adverse employment actions related to her pregnancy discriminated against her on the basis of sex.[86]

This was the approach the Supreme Court followed, and the conclusion that it reached, in *Geduldig v. Aiello*[87] and *General Electric v. Gilbert*.[88] *Geduldig* involved a 14th Amendment challenge to a California state disability insurance program which denied benefits for pregnancy related needs. The court held that the program did not

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below a certain pitch or decibel level, a female plaintiff who is denied employment as a result might be able to challenge the prohibition as having a disparate impact on female job applicants. If, however, the prohibition actually affected only a very small percentage of female job applicants, the plaintiff might not be able to show a significant group-based disparity of impact to be actionable.

[86] There has been extensive scholarly writing on the proper way to frame pregnancy for the purposes of antidiscrimination law. *See e.g.*, Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1 (1985); Reva B. Siegel, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 YALE L.J. 929 (1985); Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154 (1995); Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L & SOC. CHANGE 325 (1984-85).

[87] 417 U.S. 484 (1974).

[88] 429 U.S. 125 (1976).

violate the Equal Protection Clause because the program did not penalize women for possessing a trait which men were not penalized for possessing. In effect, according to the court, the program did not discriminate on the basis of sex because it did not distinguish between pregnant women and pregnant men. Instead, the program simply distinguished between "pregnant women and non pregnant persons"[89]

Two years later, in *Gilbert*, the Court applied trait equality logic in the same way. *Gilbert* involved a Title VII challenge to an employer's disability plan which, while otherwise comprehensive, excluded coverage for disabilities arising from pregnancy.[90] Following *Geduldig*, the Court held that the exclusion of pregnancy-related disabilities from coverage did not constitute sex discrimination in violation of Title VII because the employer was not treating female employees worse than similarly situated male employees.[91] Rather than denying women something that was granted to men, the plan denied pregnancy related benefits to all employees regardless of their sex.[92] As the Court explained: "pregnancy-related disabilities constitute an additional risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially evenhanded inclusion of risks."[93]

Congress responded to *Gilbert* and *Geduldig* by passing the Pregnancy Discrimination Act in which it told courts that the appropriate comparison in pregnancy discrimination cases was the treatment of pregnant women and that of non pregnant persons similar in terms of their "ability or inability to work."[94] In a sense the court renamed

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[89] 417 U.S. at 496-97.

[90] 429 U.S. at 127-31.

[91] *Id.* at 133-36.

[92] *Id*. at 138-39.

[93] *Id*. at 139.

[94] The Pregnancy Disability Act was added to Title VII in 1978 and amended its definitions portion. It provides in relevant part:

the trait at issue from pregnancy *per se* to the more generalized trait of physical disability and then reframed the cross sex comparison in terms of this non sex specific trait. Framing questions in the pregnancy context remain, however. Circuit courts are divided as to whether the precise comparison should be to employees similarly situated in their ability or inability to work regardless of the source of their injuries or to only those similarly abled employees suffering from nonoccupational injuries.[95]

> The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs as other persons not so affected but similar in their ability or inability to work.

42 U.S.C. §2000e(k). *See also Newport News*, 462 U.S. at 684 ("The [PDA] makes clear that it is discriminatory to treat pregnancy–related conditions less favorably than other medical conditions").

[95] *Compare Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1226 (6th Cir. 1996) (holding that in order to determine whether there is a PDA violation the treatment of pregnant women should be compared with the treatment of nonpregnant individuals who are similar in terms of their ability or inability to work regardless of the place of their injury); *with Urbano v. Continental Airlines, Inc.*, 138 F.3d 204, 208 (5th Cir. 1998) (holding that the treatment of pregnant women must be compared with that of similarly abled nonpregnant workers who were injured off the job); *Spivey v. Beverly Enterprises, Inc.*, 196 F.3d 1309 (11th Cir. 1999) (holding that the PDA required that pregnant women be treated the same as other similarly abled workers who suffered nonoccupational disabilities). *See generally* Jamie L. Clanton, *Toward Eradicating Pregnancy Discrimination at Work: Interpreting the PDA to "Mean What it Says*," 86 IOWA L. REV. 703 (2001) (analyzing the disagreement among courts over who is similarly situated to the pregnant woman under the PDA).

In the race context, challenges to employers' no facial hair policies raise similar framing issues. Black men sometimes challenge such policies because shaving leads to the skin condition pseudofolliculitis barbae in a significant number of black men while having no such effect on white men. *See* Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 654 (2001).

b. Dress, Appearance & Sexual Orientation

The impossibility of true cross sex trait equality is not limited to a narrow range of cases involving sex-specific biological traits, nor are the accompanying nominalism issues so limited. Such problems with the trait equality approach are also clear in cases involving trait discrimination based on dress, appearance and sexual orientation.

Consider first a hypothetical employer who is generally perfectly willing to hire women but refuses to hire women who wear sexy clothes to work. There is no exact male equivalent to the female trait of sexy dressing and attempts to choose an appropriate cross sex approximation are puzzling.

One could, for example, name the trait at issue in the sexy dressing case in a narrowly literalistic way as wearing

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Plaintiffs and courts have generally treated such policies as race neutral ones. They have framed the trait at issue as having facial hair and concluded that the policies treat black men and white men the same with respect to this trait. Whether the policies resulted in an illegal disparate impact on black men rather than whether they were an illegal form of disparate treatment discrimination has generally been the issue in these cases. *See e.g., EEOC v. Greyhound Lines, Inc.*, 635 F.2d 188 (3d Cir. 1980) (upholding no-beard policy against disparate impact challenge because plaintiff in that case could not show actual disparate impact against black men resulting from policy); *Bradley v. Pizzaco of Nebraska*, 7 F.3d 795 (8th Cir. 1993) (striking down no-beard policy in response to a disparate impact challenge because employer could not show the policy was justified by business necessity); *Richardson v. Quik Trip Corp.*, 591 F. Supp. 1151 (S.D. Iowa 1984) (striking down no-beard policy because of its disparate impact on black men); *EEOC v. Trailways, Inc.*, 530 F. Supp. 54 (D. Colo. 1981) (same); *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112 (11th Cir. 1993) (ruling for employer on disparate impact challenge to no-beard policy on grounds that policy was justified by business necessity). One could, however, frame the trait at issue in these cases not as the presence of facial hair but as the proclivity for skin disease. Because a no facial hair policy requires black men, but not white men, to take steps to cause themselves skin disease, the policy looks like a form of race-specific trait discrimination when framed in this way.

particular types of clothes, i.e. low cut blouses and tight skirts. Naming the trait at issue in this way, the woman is the victim of sex discrimination if she is being treated worse than a man who wore the same types of blouses and skirts to work. She is not the victim of sex discrimination if she is not being treated worse than a man who wore the same clothes. Framing the issue in this way is unlikely to result in a finding of sex discrimination.

It is far from clear, however, that this narrowly literalistic framing of the cross sex comparison is appropriate. The proper comparator for the sexy dressed woman may not be a man dressed in the very same clothing. A man dressed in a low cut blouse and tight skirt might be objectionable to the employer but it is probably not because he is sexy. If the employer is really objecting to a female employee exuding sexuality at work, it arguably does not bolster or refute this woman's claim of sex discrimination under the trait equality approach to show that the employer also objects to hiring men in drag. Sexy dressed women and men in drag arguably do not possess the same (or even a close approximation of the same) trait.[96]

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[96] Consider similarly a woman and man who both wear high healed shoes to work. What it means, to wear high heels as a woman is very different from what it means to wear high heels as a man. Wearing high heels as a woman fits into a particular pattern of decoration-focused traits and attributes commonly and acceptably associated with women. High-heel wearing has meaning for women—it is associated with sexiness, dressiness, and physical display—and it is a meaning stemming from the trait's comfortable place within a set of gender appropriate behavior. What it means to wear high heels as a man is entirely different. High-heel wearing is not part of a set of gender appropriate behavior for men. As a result, high-heel wearing for men is commonly perceived as neither sexy nor dressy but simply deviant and strange. In *Oiler v. Winn-Dixie Louisiana, Inc.*, the district court saw a man dressing as a woman as not only dissimilar from a woman dressing as a woman but indeed as disordered. According to the court, "this is not a situation where the plaintiff failed to conform to a gender stereotype. Plaintiff was not discharged because he did not act sufficiently masculine or because he exhibited traits normally valued in a female employee, but disparaged in a male employee. . . . The plaintiff was terminated

Alternatively then, one could instead frame the cross sex comparison by looking at the way the employer treats men dressed in sex-specific sexy clothing. Of course, deciding what constitutes sexy dressing for men is itself not obvious and probably open to disagreement.[97] Is the parallel to the sexy dressing woman in revealing short skirts and low cut blouses a man in revealing open-chested shirts and tight pants. Or, because of the significantly different social and symbolic meanings of women and men in revealing clothing, are tight and revealing clothes considered sexy in women but strange, inappropriate and nonsexy in men such that this too may not be an appropriate comparison?

Finally, one could instead compare the employer's treatment of sexy dressing women with its treatment of men who violate appropriate workplace norms. At this level of abstraction, however, the trait equality approach becomes toothless and unable to challenge employers' endorsement of any gender stereotypes. The problem is not only that there is no exact cross sex trait parallel but that there is no good, and certainly no uncontroversial, approximation.

Naming and framing issues of this sort dominated the court's analysis in the sex discrimination case of *Craft v. Metromedia*.[98] Christine Craft was hired as a TV co-anchor by a television station in Kansas City, Missouri. Immediately after she began the job, the station began having concerns about Craft's appearance. Public opinion surveys performed by a media consultant company hired by the television station found that viewers had an "overwhelmingly negative" response to Craft's

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because he is a man with gender identity disorder who, in order to publicly disguise himself as a woman, wears women's clothing, shoes, underwear, breast prostheses, wigs, make-up, and nail polish, pretends to be a woman, and publicly identifies himself as a woman named 'Donna.'" *See Oiler*, 2002 WL 31098541 at *5.

[97] I suspect there is significantly less social consensus regarding what constitutes sexy dressing for men than there is about what constitutes sexy dressing for women.

[98] 766 F.2d 1205 (8th Cir. 1985).

appearance.[99] After continually poor survey results, the station reassigned Craft from co-anchor to reporter. Craft refused to accept the assignment and sued for sex discrimination.[100] Craft argued that she was discriminated against because she was held to more stringent appearance standards than were male newscasters. The district court ruled in favor of Metromedia on Craft's Title VII sex discrimination claim and the Eighth Circuit affirmed.

As with the previous examples, it is not clear how to analyze Craft's discrimination claim under the trait equality approach. It is not clear how to characterize the trait for which Craft was fired nor how to identify appropriate male employees with whom to compare her treatment. Was Craft demoted for possessing particular/precise traits (e.g., having short hair, wearing oxford shirts) such that her treatment should be compared to that of male newscasters possessing the same traits? Interpreting the trait for which Craft was demoted in this narrow way does not, however, well capture what the station actually found problematic about Craft's appearance. The station was clearly concerned with Craft having an overall appearance that was pleasing and attractive to viewers. It was not committed to or concerned about Craft having any particular aesthetic attributes. Indeed, judging from the many different people hired by the station to advise Craft about her wardrobe and appearance, it appears that the station did not have a clear idea about what physical and clothing attributes would please mercurial viewer tastes. Alternatively, was Craft demoted for having an overall appearance that was unattractive to viewers such that her treatment should be compared to that of male newscasters whose appearance was also unattractive to viewers? This was essentially the comparison that both the district and the circuit courts made.[101] Again though,

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[99] *Id*. at 1209.

[100] *Id*. at 1209.

[101] The district court concluded: "defendant's standards of appearance for its on-air personnel can in no way be considered discriminatory per se.

applying the trait equality rationale at this high level of abstraction simply reifies socially gendered conceptions of beauty and fails to find discrimination any time an employer consistently enforces sex specific gender norms.

In fact, Craft did not object to her being held to a different gender specific standard of grooming and appearance. She simply argued that these standards were more stringent and more strictly enforced for women than for men.[102] However, once one accepts the legitimacy or

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Both men and women were required to maintain a professional, business-like appearance consistent with community standards." *Craft v. Metromedia, Inc*., 572 F. Supp. 868, 877 (W.D. Mo. 1983). The court of appeals agreed that the station's enforcement of socially gendered appearance standards on its newscasters was consistent and non discriminatory. According to the court:

> While there may have been some emphasis on the feminine stereotype of 'softness' and bows and ruffles and on the fashionableness of female anchors, the evidence suggests such concerns were incidental to a true focus on consistency of appearance, proper coordination of colors and textures, the effects of studio lighting on clothing and makeup, and the greater degree of conservatism thought necessary in the Kansas City market. The 'dos' and 'don'ts' for female anchors addressed the need to avoid, for example, tight sweaters or overly 'sexy' clothing and extreme 'high fashion' or 'sporty' outfits while the male 'dos' and 'don'ts' similarly cautioned against 'frivolous' colors and 'extreme' textures and styles as damaging to the 'authority' of newscasters. These criteria do not implicate the primary thrust of Title VII, which is to prompt employers to 'discard outmoded sex stereotypes posing distinct employment disadvantage for one sex.'

Craft, 766 F.2d at 1215 (citations omitted).

[102] Craft and supporting amici curiae argued both that the television station enforced appearance standards more strictly on female than male on-air personnel and that the socially gendered appearance standards themselves were discriminatory. *Craft*, 766 F.2d at 1212-1214. Craft presented evidence showing that "only females were subject to daily scrutiny of their appearance or were ever required to change clothes at the station before going on the air and that no male was ever directed to take time from his journalistic duties to select clothing, with the help of a

necessity of sex-specific appearance scales, there is no way to identify a good opposite-sex parallel to Craft's level of attractiveness so as to determine whether men with similar levels of attractiveness were treated differently.

Related nominalism issues arise in cases involving discrimination based on sexual orientation. When a woman is discriminated against for engaging in a sexual relationship with a woman it is significant, and often outcome determinative under trait equality logic, how one names the trait for which she is being adversely treated. There is no trait that a man can possess that is exactly the same as the one the woman is being fired for. Having sex with a woman as a man is different from having sex with a woman as a woman, and having sex with someone of the same sex as a man is different than having sex with someone of the same sex as a woman. There is no exact opposite sex trait parallel for the woman having sex with a woman.

Findings of discrimination under the trait equality approach again descend to the level of nominalism. If one names the trait at issue as having sex with women, then the appropriate opposite sex parallel would be a man who has sex with women. If the woman who has sex with women is treated adversely while the man who has sex with women is not, then the trait equality requirement has been violated and sex discrimination exists. If, however, one names the trait at issue as engaging in same-sex or homosexual sexual relations, then the opposite sex parallel would be a man who also engages in same sex or homosexual sexual relations. If the woman is not being treated worse than a man who also engages in same-sex sexual relations then the trait equality

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consultant, from Macy's and to test that clothing on camera for the approval of another consultant." *Id*. at 1212-1213. In addition, Craft, but seemingly no one else at the station, was eventually required to use a clothing calendar. According to the court of appeals, "[t]he 'clothing calendar' was a calendar given to Craft showing in detail for each day the blazer, blouse, and skirt (or occasionally slacks) she was to wear. A note in one corner indicated that the appropriate accessory would be either a single strand of pearls or a single gold chain." *Id.* at 1209 n. 2.

requirement has not been violated and sex discrimination does not exist. How one names the initial trait at issue is conceptually ambiguous, politically loaded, and outcome determinative under the trait equality approach to trait discrimination.[103]

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[103] Certainly there has been a great deal of scholarly writing regarding why one type of framing is better than the alternatives. *See e.g.*, Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. REV. 471 (2001) (highlighting the weaknesses of the argument that discrimination based on sexual orientation is a form of sex discrimination); Andrew Koppelman, *Defending The Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein*, 49 UCLA L. REV. 519 (arguing in favor of treating discrimination based on sexual orientation as a form of sex discrimination). *See also* David S. Schwartz, *When is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1773-74 (2002) ("Embracing a sex-stereotyping theory in a same-sex harassment case would be tantamount to extending Title VII harassment protection to lesbians, gays, and gender nonconformists. Such discrimination is inevitably based on the perception that the target of the discrimination has failed to adopt behavior—gender or sexual behavior—deemed suitable to his or her sex, and is therefore discrimination 'because of . . . sex' under a plain language reading of Title VII"); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of 'Sex,' 'Gender,' and 'Sexual Orientation' in Euro-American Law and Society*, 83 CAL. L. REV. 1, 125-26 (1995) ("[W]hile sex and gender discrimination are formally illegal and sexual orientation discrimination is not, it is impossible (by conflationary definition) to practice 'sexual orientation' discrimination without also and simultaneously committing sex and gender discrimination"); Catharine A. MacKinnon for National Organization on Male Sexual Victimization, et al., United States Supreme Court Amicus Brief in *Oncale v. Sundowner Services*, in support of Oncale, 1997 WL 471814 *28 ("When individuals are sexually harassed because of the sex of their sexual partners, real or imagined, they are harassed because of sex. First, formally speaking, those harassed because they are gay men or lesbian women are harassed because of the gender of their sexual partners and identification. If their own gender, or that of their loved ones, were different, they would not be so treated'); Stephen Clark, *Same-Sex But Equal: Reformulating the Miscegenation Analogy*, 34 RUTGERS L. J. 107, 120-38 2002) (discussing and analyzing the different ways to conceptualize discrimination based on one's involvement in a same-sex sexual relationship);ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND

c. Character Traits

The indeterminacy of the trait equality approach is not limited to exceptional cases. In somewhat more subtle ways the impossibility of cross sex trait parallelism and the naming and framing problems that stem from it are systematic and undermine the approach's usefulness in all cases, not only the more obvious ones discussed above.

In a sexist society nothing done by men and women will have precisely the same meaning. Traits are not understood or viewed as isolated technical attributes. They are necessarily viewed in relation to all the other traits an individual possesses and through a systematically gendered lens.

Traits such as competitiveness or active leadership, for example, are perceived very differently when possessed by women or men. Consider one study in which participants were told to evaluate job candidates for a computer lab manager position at a university. Participants viewed videotapes and read "life philosophy" essays from female and male candidates. Researchers found that female candidates with essays that emphasized "agentic" qualities such as competitiveness were rated "less socially skilled and likeable than an identically presented man."[104] Another study found that the same leadership activities of women and men resulted in very different affective responses from those dealing with them. Women engaging in group leadership activities received more displeased responses and fewer pleased responses from group members than did men

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SOCIAL EQUALITY 154-58 (1996) (using trait equality logic to argue that sexual orientation discrimination is a form of sex discrimination).

[104] Laurie A. Rudman & Peter Glick, *Prescriptive Gender Stereotypes and Backlash Toward Agentic Women*, 57 J. SOC. ISSUES 743, 747 (2001). The study involved as participants 172 (105 women, and 67 men) undergraduates at Rutgers University. The participants viewed videotapes and read "life philosophy" essays from women and men whom they were told were candidates for a computer lab manager position at the university.

engaging in the same behavior and making the same suggestions and arguments.[105] Therefore, even when technical trait symmetries are possible (in the sense that women and men can physically do precisely the same thing), traits will mean very different things when possessed by a woman or by a man.

Price Waterhouse v. Hopkins provides a good example. It is simply not the case that Hopkins was fired for engaging in or exhibiting the same traits that men engaged in and exhibited. Social meanings are real. Aggressiveness in women is bitchy in a way aggressiveness in men is not. Competitiveness in women is threatening in a way that competitiveness in men is not. Vulgarity in women is shocking and disturbing in a way that vulgarity in men is not. Even if Ann Hopkins had engaged in technically identical behavior to that of her male colleagues, her behavior would not have been socially the same. Determining whether Hopkins was the victim of sex

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[105] *See* D. Butler, & F.L. Geis, *Nonverbal Affect Responses to Male and Female Leaders: Implications for Leadership Evaluations*, 58 J. PERSONALITY AND SOCIAL PSYCHOLOGY 48 (1990). The study involved 168 student participants (84 women and 84 men). Participants took part in small discussion groups composed of one male and one female participant and one male and one female confederate who were trained by the researchers to perform the role of group leader in a standardized manner. The study used two leader scripts, A and B, in all discussions. In half the sessions the male leader used script A and the female leader used script B, and in the other sessions it was reversed. Coders sat in an adjacent room behind one way mirrors and tallied participants' non verbal affect expressions. Coders tallied nonverbal cues of pleasure such as smiling or nodding in agreement and coded nonverbal cues of displeasure such as a furrowed brow, tightening of the mouth or nods of disagreement. In addition to controlling what the female and male leaders actually said, the researches monitored the male and female leaders to make sure that they did not differ in eye contact, gaze direction, body posture or amount of body movement. *See also* Eagly, A.H., Makhjani, M.G. & Klonsky, B.G., *Gender and the Evaluation of Leaders: A Meta-Analysis*, 111 PSYCHOLOGICAL BULLETIN 3 (1992) (finding that women managers with a direct task-oriented leadership style are evaluated more negatively than men with similar management styles).

discrimination under the trait equality approach again depends on how one chooses to name the behavior for which she was fired and frame the (approximate) cross sex comparison.

To point out that women and men can never possess precisely the same traits in precisely the same way is not to argue that employers are therefore justified in treating women and men differently. Recognizing the gendered meanings of traits is important, though, because it highlights that to the extent that women and men should be treated the same it is not because they are in fact precisely the same but in spite of the fact that they are not. It was appropriate, for example, for Title VII to prohibit law firms from refusing to hire female lawyers because clients objected to working with them. But this was not because female lawyers really were/are just like male lawyers. Instead, it was because eradicating the gender norms that made female lawyers seem strange, incompetent, or offensive was essential to Title VII's sex equality mission.

This recognition then also suggests a second possible conception of and justification for the trait equality approach to sex discrimination. Perhaps the real intuition underlying and driving the trait equality approach is not that aggressive women or men in dresses must be treated the same as aggressive men or women in dresses because they are in fact the same, but that they cannot be treated differently because of gender norms. In other words, the vision of nondiscrimination underlying the trait equality approach may not be based on a claim of sameness but instead on a claim of the illegitimacy of certain kinds of differences. The trait equality approach viewed in this way requires willful blindness to social meanings about gender and defines nondiscrimination as the elimination, or at least the nonenforcement, of gender norms by employers.

In the following section, I will show that this second conception of trait equality, while certainly more coherent at explaining why aggressive women should be treated like

aggressive men and men in dresses should be treated like women in dresses, is no better at justifying trait equality as the appropriate response to sex-specific trait discrimination under Title VII. Title VII's nondiscrimination mandate does not require the rigid neutrality and blindness to gender norms called for by the trait equality approach. Moreover, the approach, while not necessary for substantive equality, is likely to be costly in terms of employee and employer liberty.

2. The Problem of Neutrality

An alternative way to understand the trait equality approach is as an argument against gender norms. Nondiscrimination requires rigid neutrality toward women and men engaged in technically similar behavior not because the behavior really looks the same, but because the reason it looks different is illegitimate. The approach conceived of in this way views gender norms as illegitimate and the nonenforcement of them as a core component of Title VII's nondiscrimination goal. Although the trait equality requirement of rigid sex neutrality becomes more coherent as a result of this anti-norms argument, it becomes no more convincing as an interpretation of Title VII. In this section I argue that rigid neutrality is neither required by Title VII nor otherwise normatively appealing. I show that sex neutral rules themselves do not always look nondiscriminatory, and, more importantly, nonneutral rules are not always discriminatory. Rigid neutrality and elimination of gender, is not necessary to end sex hierarchy in the workplace and is not, therefore, required by Title VII. Moreover, equating nondiscrimination with rigid neutrality is likely to encourage an androgyny in the workplace that, while being unnecessary for equality, has serious costs for individual liberty.

What nondiscrimination means in the context of employment may actually be significantly more complex than the formal sex neutrality called for by the trait equality

approach. To highlight the intuitive disconnect between neutrality and nondiscrimination consider three scenarios and how they play out under the trait equality approach.

a. *The Aggressive Woman*. As the *Hopkins* case illustrated, aggressive women are viewed differently and more negatively than are aggressive men. Aggressive men are likely to be perceived as authoritative and competent while aggressive women are likely to be perceived as bitchy, shrill, and overbearing. A woman who is terminated or denied promotion for engaging in the same aggressive behavior that male co-workers engage in without adverse effect might argue that trait equality requires that she be treated the same as similarly behaving men despite the different social meanings attached to the behavior for women and men.

b. *The Cross-dressing Man*. Men in traditionally female clothing and make-up are viewed more negatively than are women in the same attire. Women wearing traditionally female clothes are viewed as social conformists, while men wearing women's clothes are viewed as gender nonconformists and, sometimes, as social deviants. A man denied employment or terminated from employment because of his cross-dressing might rely on the trait equality approach to argue that he cannot be penalized for engaging in the same behavior—e.g. wearing skirts, high heels, and make-up—which female employees engage in without adverse action.

c. *The Buzz Cut Woman*. A buzz haircut on a woman has significantly different meaning than a buzz haircut on a man. Shannon Faulkner made this point when she fought to gain admittance to The Citadel without also being forced to get the "knob" haircut traditional to male cadets. As Faulkner argued, while the meaning of the buzz cut on a man is an acceptable masculinity, the meaning of the buzz cut on a woman is an unacceptable and strange masculinity at odds with appropriate gender norms. On a woman, a buzz cut would signal not straight-laced hyper-masculinity

but socially and sexually deviant "outlaw" status.[106] The Citadel responded by invoking the logic of trait equality. The Citadel argued that if nondiscrimination means treating women and men the same regardless of the different social meanings attached to particular traits, then they could not be engaging in sex discrimination by treating Faulkner the way they would treat any incoming male cadet who refused to get the knob haircut.[107]

From the perspective of the trait equality approach, it is hard to distinguish among these cases. The trait equality approach, at least when applied in the way its advocates encourage, seems to protect the aggressive woman, the cross-dressing man and The Citadel. One might believe, however, that as a substantive matter rejecting gender norms and acting neutrally in the context of The Citadel hindered rather than encouraged sex equality. [108]

This was the argument made by Faulkner and The Department of Justice. Faulkner's lawyer argued that "[t]he principle of formal equality . . . ignored the social meaning of the haircut, a code for masculinity that marks a cadet as male. . . . Stripped of her hair, Shannon would be doubly excluded: she would not look like a male cadet, but neither would she look like a real woman. She would be a gender outlaw—neither male nor female. Doubtless many male

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[106] *See* Valerie K. Vojdik, *Gender Outlaws: Challenging Masculinity in Traditionally Male Institutions*, 17 BERKELEY WOMEN'S L.J. 68, 70-71 (2002). *See also* Center for Military Readiness, et al. United States Supreme Court Brief in *U.S. v. Commonwealth of Virginia*, in support of Commonwealth of Virginia. 1995 WL 744997 at *14 (describing the Department of Justice arguments to the district court that a buzz haircut simply did not fit into the range of traits and attributes deemed socially acceptable for women).

[107] *See* Vojdik, *supra* note __ at 70-71 (noting The Citadel argument that equal treatment "meant the same treatment afforded male cadets").

[108] Imposing trait equality on Faulkner in this case would probably seem discriminatory even if the requirement were not so clearly being used by the Citadel as simply a pretext for her exclusion. *See* Vojdik, *supra* note __ (describing the violence and desperation with which The Citadel tried to exclude Faulkner).

cadets would label her a 'dyke,' a butch lesbian whose sexual desire for women makes her not a 'real woman.'"[109] Similarly, the Department of Justice argued that The Citadel "'was proceeding under the guise of gender-neutral grooming policies [that] implement rules which altogether denigrate Ms. Faulkner's identity as a woman.'"[110] The district court rejected these norm-based arguments and adopted instead the equation of nondiscrimination with formal trait equality when it refused to enjoin The Citadel from requiring Faulkner to get the knob haircut.[111] As the district court essentially asked, if neutrality is the appropriate definition of nondiscrimination then how can it be discrimination to impose a sex-neutral trait requirement?

One might of course argue that it is one thing to require sex neutrality when it is being sought by a plaintiff who wants to possess a gender atypical trait, but it is something quite distinct to allow employers to impose a sex-neutral (but gender bending) requirement on an unwilling plaintiff who does not want to challenge traditional gender norms. It is a different thing, in other words, to say The Citadel must permit Faulkner to get a knob haircut if she had wanted one, than to say that The Citadel may require Faulkner to get a knob haircut even if she does not want one.[112] This distinction is certainly meaningful. It suggests,

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[109] Vojdik, *supra* note __ at 71.

[110] Center for Military Readiness Amicus Brief, *supra* note __ at *14 (source of quotation omitted from original). One could likewise imagine an employer that refused to hire anyone with hair longer than one-quarter inch in length. The employer would argue that its policy did not violate the trait equality requirement while women challenging the policy would argue that nondiscrimination required something other than trait equality.

[111] Vojdik, *supra* note __ at 71.

[112] Imagine that Faulkner had wanted to get a knob haircut and The Citadel had tried to stop her by arguing that on women the haircut signified a strange outlaw status that was not in keeping with the mission and message of The Citadel. In this scenario, arguments about the social meaning of hair probably seem less persuasive and

however, that what it means to not discriminate on the basis of sex may in fact be significantly more complicated than a simple requirement of employer neutrality.

Trait equality advocates might respond by arguing that although for them nondiscrimination always requires sex-neutral requirements, not every neutrally imposed requirement will be acceptable, some will be impermissibly burdensome or unfairly costly for individuals of one sex or the other.[113] Neutrality, they might argue, is in a sense a necessary but not sufficient condition for nondiscrimination.

Even this claim is too strong, however. Neutrality and the nonenforcement of gender norms are not always necessary for nondiscrimination, and nonneutrality does not always constitute sex discrimination. Certainly, many gender norms—such as that equating female aggressiveness with bitchiness—are incompatible with women's full, effective participation in the work world. All gender norms, however, are not created equal. Employers may recognize some norms without impeding sex equality in the workplace. An employer may, for example, require male employees to have hair no longer than the top of their collars while imposing no such requirement on female employees. The gender norm at issue—that serious, professional men have short hair--does not reinforce messages of male dominance or of female weakness, sexual availability or incompetence. Enforcing the norm that men should have short hair does not limit the range of job possibilities available to men or diminish their perceived competence for such jobs. Permitting women a wider range of acceptable hairstyles enables them to mimic a professional male hairstyle or choose a more traditionally feminine style. Similarly an employer may permit women to wear skirts without permitting men to do so. Again, men are not

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arguments in favor of trait equality more persuasive than they did in the actual case.

[113] Such is, of course, the insight of the disparate impact doctrine of Title VII.

disadvantaged in the work world by being forced to mimic the clothing style of the ideal male worker, and women, too, are not harmed by being given the choice of mimicking the ideal male clothing style or choosing a more traditionally feminine style. Allowing employers to act on the gender norm making men in dresses seem deviant does not impede the ability of men (or women) to participate fully and effectively in the work world. Certainly, some men will feel constrained by the previous sex-specific trait requirements, but the requirements themselves do not inhibit the substantive sex equality that is Title VII's goal. Moreover, as a practical matter, it is unlikely that gender-bending men will be less constrained under a pure trait equality regime than under one allowing for limited instances of sex-specific workplace rules.

One possible result of the trait equality approach, the one advocates like Case and Taylor hope for, is that employers will expand the range of permissible traits and attributes open to employees of both sexes allowing both women and men to gender bend or not gender bend depending on their own preferences. An employer might, for example, have a grooming code that allowed for two possible haircuts. One shoulder-length bob generally more appealing to women, and one crew cut generally more appealing to men. Both women and men would, however, be able to choose either cut.

This is not, however, the only, or perhaps even the most likely, response to the trait equality requirement. If employers are uncomfortable with gender bending behavior—either because of their own sensibilities or because they think it will offend their customers—they may choose instead to narrow the range of trait options available to their employees to only those that the employer will find acceptable when possessed by either sex.[114] The options, in

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[114] This is a possibility that Case herself clearly recognizes. *See* Case, *supra* note __ at 8. Another alternative would be for employers to increase their pre-employment screening measures so as to exclude

other words, will converge toward an androgynous mean. The employer who does not want to employ men in bob haircuts will simply not make this an option under its dress code, even if it does not mind women wearing them. The result is not more options for men to gender bend but fewer traditionally gender conforming options for women.

Such androgynous workplace rules are, moreover, unlikely to be sex neutral in their costs. Even assuming, as I have above, that trait equality advocates would limit the kind of neutral requirements that employers could impose so as to prohibit trait requirements that would make public participation disproportionately costly for individuals of one sex or the other, there is in fact no dress, grooming, or trait requirement that does not burden individuals of one sex more than the other. There really is no single hairstyle that looks equally good and is equally socially acceptable on women and men. Short hairstyles for women tend to be significantly more layered and styled than short hairstyles on men. Clothing styles may appear relatively androgynous but even there if we were really to put women and men in exactly the same clothes with exactly the same cuts one sex or the other would look a bit weird. The dark blue pants suit women wear is really not exactly the same as the dark blue pants suit that men wear. It is generally cut more narrowly in the jacket, and paired with pants that are narrower at the waist and fuller at the hips. Sex neutral requirements will, therefore, almost never be sex neutral in their costs.

This push in the name of antidiscrimination toward androgyny also leads to a sub pareto optimal outcome in the sense that some women and men would be made better off and none would be made worse off if the employer were

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applicants with a propensity to gender bend. In this way, employers could maintain more expansive clothing and grooming options for their employees while ensuring that the individuals they hire will not in fact engage in gender bending behavior. Under this approach, individuals with a desire to gender bend will not be formally prevented from doing so, they simply will not be hired. I thank Max Schanzenbach for emphasizing this point to me.

permitted to institute some sex-specific rules. Both women and men would then be permitted to engage in certain types of gender normative behavior. Certainly cross-dressing men would not be better off under limited sex-specific employment rules permitting women but not men to wear dresses, but nor are they terribly well off under rules requiring androgynous dress from everyone. Equating nondiscrimination with strict neutrality is likely to diminish the freedom of everyone while increasing that of no one. The costs to liberty are high, and they are neither required nor justified by Title VII's mandate of equality.

In sum, the trait equality approach to trait discrimination is initially appealing because of its formal equality ring and its seeming structural simplicity. Upon closer scrutiny, however, trait equality proves to be neither simple to understand nor easy to defend. To the extent it is based on the premise that like must be treated alike, the approach collapses into a controversial and indeterminate naming game. To the extent it is based not on the premise of sameness but on the illegitimacy of certain types of difference, the approach mistakenly and needlessly equates the existence of gender norms with sex inequality. This equation and its requirement of formal neutrality is likely to cost us all much, it is likely to gain gender benders little, and it is unnecessary for the substantive sex equality Title VII requires. In the following sections, therefore, I search for a better response to the question of when sex-specific trait discrimination is actionable sex discrimination.

III. Trait-Focused Approaches

This section considers two narrower approaches to the problem of sex-specific trait discrimination, both of which focus on the nature of the particular trait that is at issue. The first approach makes sex-specific trait discrimination actionable only when the trait is an immutable characteristic or a fundamental right. The second approach makes trait discrimination actionable when the

trait is integral to one's gender identity. Both approaches would find actionable significantly less conduct than is currently prohibited by courts.

A. Immutable Traits/Fundamental Rights

Eighteen years before the Supreme Court articulated its sex stereotyping/trait equality rationale in *Price Waterhouse v. Hopkins*, it offered a very similar rationale in the case of *Phillips v. Martin Marietta Corporation*.[115] *Martin Marietta* involved a challenge to the company's policy of refusing to accept job applications from women with pre-school age children while at the same time hiring men with pre-school age children.[116] *Martin Marietta* was a clear case of sex-specific trait discrimination. The company did not bar women as a general matter from employment, and indeed regularly hired women. [117] The company simply refused to hire women, and only women, with young children.

The Supreme Court held that Martin Marietta's hiring policy would constitute impermissible sex discrimination in violation Title VII unless the company could show that such discrimination was permissible under Title VII's bona fide occupational qualification exception.[118] The Court held that it was a violation of Title VII for an employer to have different hiring criteria for women and men and to refuse to hire women for possessing traits and attributes which were not disqualifying when possessed by men.[119] According to

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[115] 400 U.S. 542 (1972).

[116] *Id*. at 543.

[117] In fact, at the time Phillips applied for the position of assembly trainee, 70-75% of the applicants for the position were women and 75-80% of those hired for the position were women. *Id*.

[118] *Id*. at 544. The court explained that "[t]he existence of . . . conflicting family obligations, if demonstrably more relevant to job performance for a woman than for a man, could arguably be a basis for distinction under §703(e) of the Act. But that is a matter of evidence tending to show that the condition in question 'is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.'" *Id*.

[119] *Id*.

the Court, "Section 703(a) of the Civil Rights Act of 1964 requires that persons of like qualifications be given employment opportunities irrespective of their sex. The Court of Appeals therefore erred in reading this section as permitting one hiring policy for women and another for men—each having pre-school-age children."[120]

Subsequently, some courts simply followed the plain language of the Supreme Court's decision in *Martin Marietta* interpreting it as prohibiting any and all sex-specific trait requirements and requiring the kind of formal neutrality of the trait equality approach.[121] More commonly, however, courts interpreted *Martin Marietta* narrowly as prohibiting

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[120] *Id*. The discrimination made actionable in *Martin Marietta* often came to be called "sex-plus" discrimination. The term was coined by the Fifth Circuit's Chief Judge Brown in his dissent to the Fifth Circuit's decision not to rehear the *Martin Marietta* case. Brown argued against the appeals court panel's decision allowing the employer to engage in sex-based trait discrimination contending that "[i]f 'sex-plus' stands, [Title VII] is dead." *Phillips v. Martin Marietta Corp*., 416 F.2d 1257, 1260 (5th Cir. 1969) (Brown dissent). *See generally*, Regina E. Gray, The *Rise and Fall of the 'Sex-Plus' Discrimination Theory: An Analysis of Fisher v. Vassar College*, 42 HOW. L.J. 71 n.34 (1998); Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REF. 371 n. 101 (2001).

[121] In a sense, some courts interpreted *Martin Marietta* as requiring the trait equality discussed in the last section. *See e.g*., *Sprogis v. United Air Lines Inc*., 444 F.2d 1194, 1198 (7th Cir. 1971) (relying on *Martin Marietta* to hold that a no marriage rule applied to female but not male flight attendants violates Title VII because "in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes"); *Aros v. McDonnell Douglas Corp*., 348 F. Supp. 661, 664 (C.D. Cal. 1972) (holding that a dress and grooming code constitutes sex discrimination when applied differently to women and men); *Donohue v. Shoe Corp. of America*, 337 F. Supp. 1357 (C.D. Cal. 1972) (requiring short hair on men but not on women violates Title VII); *Roberts v. General Mills, Inc*., 337 F. Supp. 1055 (N.D. Ohio 1971) (allowing female employees to wear hairnets but requiring men to wear hats—and therefore keep their hair short—violates Title VII).

only sex-specific trait discrimination based on immutable characteristics or fundamental rights.[122]

The Fifth Circuit most clearly articulated this narrower approach in the case of *Willingham v. Macon Telegraph Publishing Company*.[123] *Willingham* involved a challenge brought by a male job applicant who was denied employment because his long hair violated the company's grooming code. The company refused to hire men with long hair but not women with long hair.[124] In affirming the district court's judgment in favor of the employer, and upholding the company's grooming code, the court explained that "a line must be drawn between distinctions grounded on fundamental rights . . . and those interfering with the manner in which an employer exercises his judgment as to the way to operate a business."[125] The court held that while Title VII protected against sex-specific trait discrimination which targeted traits that were particularly important—namely immutable characteristics and fundamental rights—Title VII did not protect all trait-based discrimination whereby an employer chose to single out a particular subset of women or men for adverse treatment. The court explained:

> Equal employment opportunity may be secured only when employers are barred from

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[122] *See generally* Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers who are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77 (2003) (noting that the 'plus' in "sex-plus' cases must be "either a fundamental right, such as having children or marrying, or an immutable physical characteristic"); Gray, *supra* note __ at 84 ("The requirement that the 'plus' in a 'sex-plus' case consist of an 'immutable characteristic' or a 'fundamental right' was established in cases challenging employers' grooming/dress code regulations"); Kessler, *supra* note __ at 392 ("Courts have found that sex-plus discrimination is a violation of Title VII only if the 'plus,' or facially neutral characteristic, is either a fundamental right or an immutable physical characteristic").

[123] 507 F.2d 1084 (5th Cir. 1975).

[124] *Id*. at 1087-88.

[125] *Id*. at 1091.

> discriminating against employees on the basis of immutable characteristics, such as race and national origin. Similarly, an employer cannot have one hiring policy for men and another for women if the distinction is based on some fundamental right. But a hiring policy that distinguishes on some other ground, such as grooming codes or length of hair, is related more closely to the employer's choice of how to run his business than to equality of opportunity.[126]

The immutable characteristic/fundamental right limitation on actionable trait discrimination avoids some of the conceptual and normative difficulties of the trait equality approach. The approach, however, is radically under inclusive in the types of trait discrimination it would treat as actionable.

A narrow focus on trait discrimination based on immutable characteristics or fundamental rights, would, for example have denied protection to Ann Hopkins, and other women who suffer adverse job consequences because they are aggressive.[127] Aggressiveness is not an immutable

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[126] *Id*. at 1091. The court continued to explain: "Private employers are prohibited from using different hiring policies for men and women only when the distinctions used relate to immutable characteristics or legally protected rights. While of course not impervious to judicial scrutiny, even those distinctions do not violate Sec. 703(a) if they are applied to both sexes." *Id*. at 1092-93. Other courts followed a similar post-*Martin Marietta* approach. *See generally Fagan v. National Cash Register Co*., 481 F.2d 1115, 1125 (D.C. Cir. 1973) (holding that discrimination based on immutable sex-based characteristics is prohibited but an employee "may be required to conform to reasonable grooming standards designed to further the employing company's interest"); *Jarell v. Eastern Airlines, Inc*., 577 F.2d 869 (4th Cir. 1978) (holding that employer's sex-specific weight requirements did not violate Title VII because weight is not an immutable characteristic).

[127] This approach would also find non actionable discrimination against effeminate men. *See e.g.*, *Smith v. Liberty Mutual Ins. Co.*, 569 F.2d 325 (5th

characteristic. Someone who is predisposed to be aggressive and competitive can train herself to be more docile and cooperative. Being aggressive is also clearly not a protected fundamental right.[128] As a result, under the integral/fundamental trait approach, an employer would be free to single out aggressive women for adverse employment treatment. An employer would not violate Title VII by hiring women generally but simply refusing to hire aggressive women. Of course, as the Supreme Court itself recognized in *Price Waterhouse*, failure to protect aggressive women from discrimination under Title VII puts all women in something of a catch-22. They can be refused employment because they are aggressive and then refused career advancement because they are not. Allowing trait discrimination aimed at aggressive women effectively undermines the ability of all women to compete in the workplace against men by denying them a characteristic that is often needed to succeed. Such a narrow approach to trait-based discrimination simply cannot be consistent with Title VII's goal of ensuring that women and men will compete in the work world on equal footing.[129]

B. Group-Identity Traits

A different approach would be to make sex-specific trait discrimination actionable only when the trait for which certain women (or men) are singled out is one that is integral to their gender-group identity. The focus of this approach is

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Cir. 1978) (relying on *Willingham v. Macon Telegraph* to hold that discrimination against effeminate men was not actionable because such sex-specific trait discrimination was impermissible only when the trait involved was a fundamental right or an immutable characteristic).

[128] Fundamental rights have been limited to such things as marrying and having children. *See e.g., Willingham*, 507 F.2d at 1091.

[129] The Supreme Court in *Price Waterhouse* necessarily rejected the immutable trait/fundamental right approach from *Martin Marietta*. Strangely, however, the Supreme Court in *Price Waterhouse* did not even mention *Martin Marietta* or the line of cases interpreting it so narrowly. *See Price Waterhouse*, 490 U.S. 228.

on discrimination based on traits that for social and cultural reasons are strongly associated with a particular group rather than on traits that for biological reasons are unique to a particular race or sex group. Discrimination based on the latter kind of traits are generally treated as simple types of ontological discrimination.[130]

Group-identity arguments of this sort are most often articulated and endorsed as a way of expanding Title VII's protection in race and national origin discrimination cases involving facially neutral trait requirements. Barbara Flagg and Paulette Caldwell, for example, both argue that Title VII should prohibit discrimination based on race-oriented or race-expressive traits in addition to discrimination based on race *per se*.[131] Flagg contends that Title VII is currently a useful tool for black employees who act white and are nonetheless treated differently because of their skin color, but it is a much less effective tool for black employees who act in certain racially identified ways and are discriminated against because of these behavioral traits.[132] Flagg argues

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[130] *See e.g., the Pregnancy Discrimination Act, supra* note __ (defining discrimination on the basis of pregnancy as a form of sex discrimination), *Rogers, supra* note __ (suggesting in dicta that discrimination based on a natural black hairstyle would constitute race discrimination).

[131] *See* Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L. J. 2009, 2015 (1995); Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 Duke L.J. 365 (1991). *See also* Kenji Yoshino, *Covering*, 111 YALE L. J. 769, 885-96 (arguing for Title VII protection against discrimination based on mutable traits that are constitutive of group identity).

[132] Flagg offers for example the actual stories of two African American sisters, Yvonne Taylor and Keisha Akbar (who had changed her name from Deborah Taylor). Both sisters were smart and skillful in their respective jobs, though they related to and expressed their racial identities very differently. Yvonne adopted a personal style that "fell well within the bounds of whites' cultural expectations. *Id*. at 2009. Her speech, dress, hairstyle and attitudes matched white norms. *Id*. at 2009. Keisha, in comparison, placed a greater emphasis on her African heritage. In addition to changing her name, Keisha "adopted speech and

that Title VII should prohibit discrimination on the basis of "personal characteristics that . . . intersect seamlessly with [one's racial] self-definition."[133]

Caldwell makes a similar argument. Caldwell focuses her criticism on the case of *Rogers v. American Airlines*.[134] Renee Rogers worked as an airport operations agent for American Airlines. She filed suit challenging American's grooming policy which prohibited employees in high customer contact positions from wearing an all-braided hairstyle.[135] Rogers argued that the policy discriminated against her as a woman, and, more specifically, as a black woman because of the historical and cultural significance a braided, or cornrow, hairstyle had for black women.[136] Indeed, Rogers contended that the cornrows hairstyle "'has been and continues to be part of the cultural and historical essence of Black American women.'"[137] The district court rejected Roger's discrimination claim concluding that American's policy, which applied neutrally to women and men of all races, did not on its face discriminate in violation of Title VII.[138] Caldwell criticizes the court's decision for

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grooming patterns consistent with [her] cultural perspective" and interpreted current events as instances of racism more than her white co-workers. *Id*. at 2010-11 and nn. 4-5. Both sisters faced adverse employment actions that seemed race related. Flagg notes that while Yvonne could easily frame a fairly standard disparate treatment claim because of her compliance with white norms, Keisha would have a very difficult time framing such a claim under existing judicial interpretations of Title VII. *Id*. at 2014-15.

[133] *Id*. at 2012. Flagg refers to adverse employment actions which result from an individual possessing traits or attributes associated with racial identity and deviating from white cultural norms as "transparently white decisionmaking." *Id*. at 2029 (according to Flagg, "[t]ransparently white decisionmaking consists of the unconscious use of criteria of decision that are more strongly associated with whites than with nonwhites").

[134] 527 F. Supp. 229 (S.D. N.Y. 1981).

[135] 527 F. Supp. at 231.

[136] 527 F. Supp. at 231.

[137] 527 F. Supp. at 232.

[138] 527 F. Supp. at 231-32.

failing to recognize and take seriously the connection between braided hairstyles and black women's racial identity and for failing to extend Title VII protection to such group-identified traits.[139]

Juan Perea makes a similar argument in the context of Title VII's bar on national origin discrimination.[140] Perea contends that most of the discrimination faced by ethnic minorities results from their possession of certain traits, not from the fact of their national origin or place of birth.[141] As a result, he argues, Title VII should protect against discrimination based on "physical and cultural characteristics that make a social group distinctive either in group members' eyes or in the view of outsiders."[142] Perea describes such characteristics as including, but not limited to: "race, national origin, ancestry, language, religion, shared history, traditions, values, and symbols, all of which contribute to a sense of distinctiveness among members of the group."[143]

Drucilla Cornell and William Bratton make a similar argument for extending Title VII to prohibit workplace rules that penalize employees for speaking a language other than English.[144] They argue that "the legal system should treat language as a fundamental identification encompassed by

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[139] Caldwell explains that "[w]herever they exist in the world, black women braid their hair. They have done so in the United States for more than four centuries. African in origin, the practice of braiding is as American—black American—as sweet potato pie." Caldwell, *supra* note __ at 379. Indeed, Caldwell argues, "a black woman's choice of hairstyle, is associated in the minds of the women themselves and others with an extension of the personality, a dignitary interest." *Id*. at 386-87.

[140] Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805 (1994).

[141] *Id*. at 839.

[142] *Id*. at 833.

[143] *Id*. at 833.

[144] *See* Drucilla Cornell and William W. Bratton, *Deadweight Costs and Intrinsic Wrongs of Nativism: Economics, Freedom, and Legal Suppression of Spanish*, 84 CORNELL L. REV. 595 (1999).

each person's right of personhood."[145] Title VII should, therefore, prohibit English-only workplace regulations because of "the value of linguistic and cultural identifications to the individual person."[146] While Flagg and Caldwell argue that protections of this sort are already called for under Title VII's existing language, [147] Cornell and Bratton, along with Perea, argue for an explicit expansion of Title VII to include certain group-identified traits.[148]

The EEOC has been fairly sympathetic to the idea that group-identity-related traits should be protected under Title VII. Indeed, in its Guidelines on Discrimination Because of National Origin, the EEOC defined national origin discrimination as "including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural, or linguistic

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[145] *Id.* at 604. *See also* Linda M. Mealey, *English-Only Rules and "Innocent" Employers: Clarifying National Origin Discrimination and Disparate Impact Theory Under Title VII*, 74 MINN. L. REV. 387 (1989) (arguing that "it is inappropriate to compare language with mutable characteristics such as hairstyle. Language is more closely analogous to religion. Both are 'mutable,' yet both go to the core of the person and are not as easily changed as hairstyle").

[146] Cornell and Bratton, *supra* note __ at 602.

[147] Flagg argues that a "pluralist" interpretation of Title VII which protects individuals from discrimination for possessing racially identified traits and deviating from white cultural norms is in fact "consistent with Title VII as written." Flagg, *supra* note __ at 2037. Although Caldwell makes this point less explicitly, she too seems to believe that the *Rogers* decision was erroneously decided under existing antidiscrimination law. *See* Caldwell, *supra* note __ at 387 (contending that "[a]ntidiscrimination law should be, and at its best is, directed toward the behavioral manifestations of such negative associations" with racially identified traits).

[148] Perea, *supra* note __ at 832. Perea proposes modifying Title VII to read: "It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, national origin, ancestry, or ethnic traits." *Id*. at 861. *See also* Cornell and Bratton, *supra* note __ at 603-04.

characteristics of a national origin group."[149] The agency stressed that "the primary language of an individual is often an essential national origin characteristic,"[150] and English-only workplace rules "disadvantage[] an individual's employment opportunities on the basis of national origin."[151] According to the EEOC, accent discrimination could also, in some instances, constitute national origin discrimination.[152]

Courts, however, have been much less favorable toward this group-identity approach to antidiscrimination law. In *Rogers* the district court accepted, for the purposes of considering the defendant's motion to dismiss, Roger's contention about the integraleness of cornrows to black women's cultural and historical identity.[153] Nonetheless, the court upheld American's policy against cornrows stressing both the neutrality of the policy--it applied to both sexes and all races—and the fact that the trait at issue was not immutable—even if it was "socioculturally associated with a particular race."[154]

In *Garcia v. Gloor*, the Fifth Circuit rejected the claim of a Mexican-American employee that his employer's rule prohibiting bilingual employees engaged in sales work from speaking Spanish on the job constituted discrimination on the basis of national origin.[155] Garcia argued that the Spanish language "was the most important aspect of ethnic identification for Mexican-Americans" so that the policy against speaking Spanish constituted national origin

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149 *See* 29 C.F.R.1606.1.

150 29 C.F.R. 1606.7(a).

151 29 C.F.R. 1606.7(a).

152 29 C.F.R. at 1606.6(b)(1).

153 *Rogers*, 527 F. Supp. at 232.

154 The court explained: "An all-braided hair style is an 'easily changed characteristic,' and, even if socioculturally associated with a particular race or nationality, is not an impermissible basis for distinctions in the application of employment practices by an employer." *Rogers*, 527 F. Supp. at 232.

155 618 F.2d 264 (5th Cir. 1980).

discrimination against Mexican Americans.[156] The court, however, refused to treat discrimination based on language use as national origin discrimination. According to the court, "Neither the statute nor the common understanding equates national origin with the language that one chooses to speak."[157] "National origin," the court emphasized, "must not be confused with ethnic or sociocultural traits . . . ."[158]

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[156] *Id.* at 267.

[157] *Id.* at 268. The court did stress, however, that this case involved a plaintiff who was "fully bilingual" and deliberately chose to speak Spanish instead of English while at work. *Id.* at 268. To the court this distinguished the case sharply from one involving a plaintiff who did not speak English at all. *Id.* at 270. The court noted that there might be circumstances in which "the ability to speak or the speaking of a language other than English might be equated with national origin" and suggested that "[t]he refusal to hire applicants who cannot speak English . . . if the jobs they seek can be performed without knowledge of that language" might be one example. *Id.* at 269-70.

[158] *Id.* at 269. *See also Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1487-88 (9th Cir. 1993) (rejecting plaintiffs' claim that employer's English only policy as applied to bilingual employees had a disparate impact based on national origin because the court held that the adverse effects were not significant enough to be actionable, but also noting in dicta that Title VII "does not protect the ability of workers to express their cultural heritage at the workplace"); *Fragante v. City and County of Honolulu*, 888 F.2d 591, 596-99 (9th Cir. 1988) (holding that employer's refusal to hire otherwise qualified applicant because of his foreign accent did not constitute national origin discrimination because the accent materially affected his ability to perform the job). *Cf. Carino v. University of Oklahoma Bd. of Regents*, 750 F.2d 815, 819 (10th Cir. 1984) (holding that employee had proven actionable discrimination based on his "national origin and related accent" and noting that "[a] foreign accent that does not interfere with a Title VII claimant's ability to perform duties of the position he has been denied is not a legitimate justification for adverse employment decisions"); *Gutierrez v. Municipal Court of the Southeast Judicial District*, 838 F.2d 1031, 1044 (9th Cir. 1988) (holding that employer's English-only policy violated Title VII by causing a disparate impact on the basis of national origin without business necessity and noting that "English-only rules generally have an adverse impact on protected groups and ordinarily constitute discriminatory conditions of employment"), *vacated as moot*, 490 U.S. 1016 (1989).

Both *Rogers* and *Gloor* involved neutral rather than group-specific trait discrimination in that the challenged employment rules applied to all employees. As a result, both plaintiffs were able to raise disparate impact as well as disparate treatment challenges.[159] In both cases, however, the courts concluded that the traits at issue—namely hairstyle and choice of language—did not warrant protection under the disparate impact doctrine. The *Rogers* decision is vague and does not distinguish clearly between its disparate impact and disparate treatment analysis. Nevertheless, the opinion suggests two reasons for dismissing Rogers's disparate impact claim. First, Rogers did not actually allege that the no cornrows policy disproportionately affected black people.[160] Second, the disparate harm that Rogers did allege, namely an identity harm to black women, was not one the court was willing to recognize under the disparate impact framework. The court focused instead on the mechanical ease with which black women could change their hairstyle and thereby avoid adverse impact. According to the court, because "[a]n all-braided hair style is an easily changed characteristic," disadvantageous treatment based on the trait did not constitute an adverse impact for disparate impact purposes.[161]

In *Gloor* the court rejected the plaintiff's argument that the English-only rule had a disparate impact on Hispanic-Americans by likewise focusing on the mutability of the trait—speaking Spanish—at issue. According to the court, "there is no disparate impact if the rule is one that the

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[159] *EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263 (11th Cir. 2000) (emphasizing that a disparate impact claim requires the identification of a specific facially-neutral practice responsible for the group-based disparity).

[160] The court noted: "Plaintiff does not allege that an all-braided hair style is worn exclusively or even predominantly by black people." *Rogers*, 527 F. Supp. at 232.

[161] *Id.* at 232 (internal quotations omitted).

affected employee can readily observe and nonobservance is a matter of individual preference."[162]

Although I have been focusing on group-specific forms of trait discrimination challenged under the disparate treatment framework rather than on neutral forms of trait discrimination challenged under the disparate impact framework, it is worth noting that these two types of trait discrimination and the legal analyses they engender may not be as distinct as they at first seem. There may, for example, be instances in which a hiring requirement is stated neutrally but works in practice to exclude only individuals of a particular sex or race. It may not be clear in such cases whether the requirement should be treated as neutral or group-specific.[163] Moreover, the judgment at the core of both a disparate impact and disparate treatment based trait discrimination claim may in fact be the same. A plaintiff challenging a group-neutral form of trait discrimination under the disparate impact doctrine must show, as a preliminary matter, that the employment requirement at issue causes a disparate adverse impact on individuals of a particular protected group. In other words, the plaintiff must show both disparity and adversity sufficiently severe to be worth the court's attention.[164] The courts in *Rogers* and

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[162] *Gloor*, 618 F.2d at 270.

[163] This was, of course, the question faced by the Supreme Court in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). The employer's disability plan looked sex neutral to the extent that it denied pregnancy benefits for women and men. It looked sex specific to the extent that it denied women medical benefits while granting men benefits for similarly disabling conditions. One could also imagine a company policy prohibiting a particular kind of hairstyle which in fact could only be worn by black (or white) women. Courts there too would be faced with the question of whether such a policy was in fact race-neutral or race-specific.

[164] *See Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1486 (9th Cir. 1993) (explaining that "[t]he crux of the dispute between Spun Steak and the Spanish-speaking employees, . . ., is not over whether Hispanic workers will disproportionately bear any adverse effects of the policy; rather, the dispute centers on whether the policy causes any adverse effects at all,

Gloor concluded that the required adversity only existed when individuals of a particular group were being disproportionately harmed for possessing traits that were immutable.[165] Sufficient adversity did not exist when individuals were disadvantaged because of traits that they could simply choose to change. [166] In fact, an immutability requirement is in direct conflict with the Supreme Court's finding of disparate impact liability in *Griggs v. Duke Power*.[167] Certainly the lack of a high school diploma, which was one trait being challenged in *Griggs*, is a mutable characteristic. What really seems to be at issue in this first level of disparate impact analysis is, therefore, not the immutability of the group-associated trait *per se*, but a more vague judicial determination that the trait at issue is one that individuals must not, at least not unnecessarily, be disadvantaged for possessing. If the trait is deemed worthy of protection, the employer can only make employment decisions based on it if doing so satisfies the business necessity requirement.[168] The core question under both

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and if it does, whether the effects are significant," and ultimately rejecting bilingual employees' disparate impact challenge to employer's English-only rule).

[165] *See Rogers*, 527 F. Supp. at 232; *Gloor*, 618 F.2d at 270.

[166] *See Rogers*, 527 F. Supp at 232 (emphasizing that cornrows were different from the immutable characteristics entitled to protection under Title VII because cornrows are "not the product of natural hair growth but of artifice"); *Gloor*, 618 F.2d at 270 (emphasizing that "Mr. Garcia could readily comply with the speak-English-only rule; as to him nonobservance was a mater of choice").

[167] *Griggs v. Duke Power*, 410 U.S. 424 (1971).

[168] Once a court recognizes that a particular trait requirement causes a legally cognizable disparate impact on a protected group, the employer must respond by showing that the trait requirement satisfies some business necessity. An employer would probably not, however, be able to justify the trait requirement and resulting disparate impact by arguing that its customers simply do not like dealing with employees with that trait. Once the trait is deemed worthy of protection under the disparate impact framework (because disadvantage based on the trait is deemed a recognizable adversity), such preferences themselves would probably look like a form of status discrimination. Consider, for example, a court

disparate treatment and disparate impact analyses really becomes whether the trait at issue is one an individual should be protected in possessing. The answer to this question is distinct from the framework under which the trait discrimination claim is brought.

Despite scholars', if not courts', support for a group-identity approach to trait discrimination in race and national origin cases, there are significant practical and theoretical problems with this approach. While most of the problems apply regardless of whether this approach is applied in race, national origin, or sex discrimination cases, and regardless of whether the trait discrimination at issue is facially neutral or group-specific, I will focus in this section on why this group-identity approach is particularly inadequate for responding to sex-specific forms of trait discrimination.

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faced with a claim similar to that raised in *Rogers* except in this case the court concludes that the plaintiff has shown a legally cognizable disparate impact on black women stemming from the no cornrows policy. In other words, the court concludes that the wearing of cornrows, like the lack of a high school diploma, is a trait which individuals should not simply be expected to change but one which they are entitled to some protection in possessing. If the court recognizes the disparate impact caused by the no cornrows policy, it is unlikely then that the employer could defend this policy by showing that customers do not like dealing with people with cornrows. Once cornrows are treated as a trait important enough to warrant some protection when possessed by black women, then customer preferences not to deal with people with this trait become a delegitimized form of status discrimination. Consider, a different example. An employer has a prohibition on hiring individuals who wear head coverings to work. Plaintiffs sue arguing that the prohibition has a disparate impact on Muslim women. The court agrees that the prohibition causes a disparate, and sufficiently adverse, impact on Muslim women because of their religion. Once the court makes this determination, it is unlikely that the employer would then be able to justify its no headscarves policy by pointing to its customers' preferences not to deal with employee's in headscarves. Head scarves become associated with Muslim women in such a way that makes anti-headscarf customer preferences seem like impermissible status discrimination.

The first and most obvious difficulty with this approach is identifying traits that are integral to one's identity as a woman or man. Identifying traits that are integral to group identity is difficult when the group at issue is race- or national origin-based, but it is probably even more difficult when the group at issue is gender-based. Is wearing dresses, jewelry or makeup integral to women's gender identity? Or are these traits too trivial to be deemed critical to gender-identity? Is talking in relational terms and placing a priority on relationships rather than informal rights integral to women's gender identity?[169] Are any traits other than those distinctly related to biology and reproduction really integral to women's group identity?[170]

For a trait to be considered integral to group identity must the trait be possessed by 50% of the members of the group, 75% of the members, 90% of the members or just some lesser "critical mass" of members?[171] How long must the trait have been associated with the group's shared identity? Does it matter if a trait has been widely associated with the group for 10 years or 100 years?[172]

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[169] Carol Gilligan famously argued that women more than men think of moral problems as arising from "conflicting responsibilities rather than from competing rights and requir[ing] for [their] resolution a mode of thinking that is contextual and narrative rather than formal and abstract." CAROL GILLIGAN, IN A DIFFERENT VOICE 19 (1982).

[170] *See* Yoshino, *supra* note __ 906-913 (describing the demand that women make pregnancy and motherhood easy to ignore as a kind of sex discrimination in which women are required to "mute their identities").

[171] Juan Perea raised this point when he asked: "how much correlation is enough to establish that an ethnic trait is actually a proxy for prohibited race or national origin discrimination? If fifty percent of the members of an ethnic group share a trait, is this sufficient for the trait to function as a proxy for the ethnic group? If two-thirds of American Latinos are bilingual, is this enough to establish Spanish English bilingualism as a proxy for Latino ethnicity? Is ninety percent required?" Perea, *supra* note __ at 852.

[172] In *Rogers,* for example, the district court emphasized that the plaintiff's braided hairstyle had only recently become "popularized" (by Cicely Tyson and then by Bo Derek). *Rogers*, 527 F. Supp. at 232. Paulette Caldwell, however, in arguing that the court should have

Even if one could determine some method for identifying group-integral traits that went beyond the purely biological, equating discrimination based on these traits with sex discrimination serves to essentialize and define women in terms of the traits they have been historically allowed to have. Protecting these socially identified traits reinforces women's commitment to them. Such traits may, however, be the product of women's subordinate social status, and may not in any deeper way represent "authentic" women's culture. [173] Moreover, and more importantly, these may not be traits that women should or do want to retain.

Catharine MacKinnon has made precisely this point in response to Carol Gilligan's work describing women's different and more relational moral voice as compared to men. MacKinnon criticizes the idea that women should seek to reify in any way the traits that have historically distinguished them from men. "For women to affirm difference," she contends, "when difference means dominance, as it does with gender, means to affirm the qualities and characteristics of powerlessness."[174]

Richard Ford makes a similar point with respect to racially identified traits. Ford worries about "misrecognizing" groups by legally ascribing to them cultural traits and attributes that have come to be associated with the group over time. Ford explains that "[t]he harm of misrecognition is that members of the misrecognized group may internalize the depreciating stereotypes of others. Such individuals, then, may not always appropriately determine

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protected plaintiff's braided hairstyle as a direct extension of her race asserted that African American women had worn braided hairstyles for more than four centuries. Caldwell, *supra* note __ at 379.

[173] As Catharine MacKinnon contends: "Women have a history all right, but it is a history both of what was and what was not allowed to be. So I am critical of affirming what we have been, which necessarily is what we have been permitted, as if it is women's, ours, possessive." CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 39 (1987).

[174] MACKINNON, FEMINISM UNMODIFIED *supra* note __ at 39.

what is fundamental to their identity, or better put, what *should* be fundamental to their identity."[175] Ford is primarily concerned with challenging racial hierarchy and subordination. He questions whether legally enshrining existing group-identified traits—which may themselves be the result of this social subordination—is the best way to end racial oppression.[176] "It is by no means clear," Ford argues, "that an argument that presumes that blacks or black women have a cultural essence as blacks or black women is a vehicle of racial empowerment."[177]

Not only does the group-identity approach to trait discrimination essentialize group members in ways that may not be either authentic or beneficial, it also permits individual plaintiffs, through the use of private lawsuits, to do the defining. Individual plaintiffs and individual courts will effectively have the power to decide often contested questions about what traits and attributes are group-identified. Rather than forcing the group as a collective to determine its identity and to confront inner-group conflicts, the group-identity approach to trait discrimination effectively gives individual plaintiffs and judges the power to define what may be highly contested group identities.[178]

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[175] Richard T. Ford, *Beyond "Difference" : A Reluctant Critique of Legal Identity Politics, in* LEFT LEGALISM/ LEFT CRITIQUE (Wendy Brown & Janet Halley eds.) 55 (2002).

[176] *See* Richard T. Ford, *Race as Culture? Why Not?* 47 UCLA L. REV. 1803, 1805 (2003) ("antiracism's goal must be to dismantle the practices and institutions that continue to produce and to reinforce racial subordination—not to safeguard (and thereby fix) individuals or groups in their ascribed characteristics").

[177] Ford, *Beyond Difference, supra* note __ at 40

[178] Ford makes this point with respect to the question of whether cornrows should be treated as a race-identified trait. Ford notes: "Suppose some black women employed by American Airlines wished to wear cornrows and advance the political message they ostensibly embody, and others thought cornrows damaged the interests of black women in particular and reflected badly on the race as a whole. . . . Now Roger's claim is no longer plausibly described as a claim on behalf of black women. Instead, it is a claim on behalf of some black women over

In fact, the group-identity approach forces courts to make decisions among potentially competing claims about what constitutes group identity.[179] These decisions then affect not only the individual litigants but all members of the group whose cultural identity has, as a result, been more sharply defined.

On a practical level, the group-identity approach is inadequate as a response to sex-specific trait discrimination because this approach would not protect women who are singled out for adverse treatment precisely because they deviate from gender stereotypes. For example, while it is not clear what traits might be considered integral to women's gender-group identity, it is certainly the case that aggressiveness and competitiveness would not be among them. A court interpreting Title VII to protect only group-integral traits would not, therefore, protect Ann Hopkins and other women harmed because of their deviation from traditional gender norms. As was the case with the immutable/fundamental trait approach, such a narrow response to trait discrimination is not consistent with Title VII's antidiscrimination goals. Indeed, the group-identity approach, given its tendency to reify existing gender norms, is more likely to entrench than to challenge group-based subordination.

IV. Mechanism of Harm Approach

An alternative to the approaches discussed in the last section is to focus not on the nature of the trait for which women (or men) are harmed, but on the mechanism by which they are harmed. Under this approach, if a group of

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the possible objections of other black women." Ford, *Beyond Difference supra* note __ at 39.

[179] *See* Ford, *Race as Culture? supra* note __ at 1811 ("The rights argument that protects culture as the authentic expression of the individual litigant must invite—in fact it must require—courts to determine which expressions are authentic and therefore deserving of protection. The result will often be to discredit anyone who does not fit the culture style ascribed to her racial group").

women is treated worse than other women and men in the workplace, what is important for determining whether such treatment constitutes actionable sex discrimination is not why the women were singled out but the means by which they were harmed. If the mechanism of harm is sexualized abuse and harassment, then the discrimination is considered to be because of sex under the meaning of Title VII. Otherwise, the trait discrimination is not actionable. As Vicki Schultz has shown, this was effectively the approach courts took in determining when harassment creating a hostile work environment was actionable. [180] Harassing conduct that was sexual in nature was deemed to be because of sex, and potentially actionable under Title VII,[181] while conduct that was not sexual in nature was deemed necessarily to not be because of sex.[182]

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[180] *See* Schultz, *Reconceptualizing Sexual Harassment supra* note __ at 1686 ("The prevailing paradigm for understanding sex-based harassment places sexuality—more specifically, male-female sexual advances—at the center of the problem").

[181] The conduct was *potentially* actionable because the other requirements for actionable sexual harassment still had to be shown. In order to state a claim for hostile environment sexual harassment a plaintiff must show: "(1) the harassment was unwelcome; (2) the harassment was because of sex; (3) the harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere; and (4) there is some basis for imposing liability on the employer." *Causey v. Balog*, 162 F.3d 795, 801 (4th Cir. 1998). *See also Leibowitz v. New York City Transit Authority*, 252 F.3d 179, 189 (2nd Cir. 2001 (same); *Bowman v. Shawnee State University*, 220 F.3d 456, 463 (6th Cir. 2000) (same); *Henson v. City of Dundee*, 682 F.2d 897, 903-04 (11th Cir. 1982) (quoted with approval in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986).

[182] Schultz, *Reconceptualizing Sexual Harassment supra* note __ at 1689 ("Courts consider only sexual advances or other sexual conduct for purposes of establishing hostile work environment harassment, and they consign less sexual forms of misconduct to a separate disparate treatment analysis (if they consider such forms at all)"). *See e.g., King v. Board of Regents of the University of Wisconsin System*, 898 F.2d 533 (7th Cir. 1990) (holding that discriminatory treatment by one supervisor that was sexual in nature was sexual harassment while discriminatory treatment by another supervisor that was not sexual in nature was not); *Turley v.*

One initial problem with the mechanism of harm approach to trait discrimination is determining when conduct is sexual in nature. Is it sexual for a man to touch a woman's buttocks?[183] Is it sexual for a man to stroke a woman's hair?[184] Is it sexual for a man to grab another man's genitals?[185] Is it sexual for a man to call a woman a cunt or a bitch or a broad?[186] Is it sexual for a man to call another man an asshole or a pussy?[187] Is posting

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Union Carbide Corp., 618 F. Supp. 1438, 1442 (S.D. W. Va. 1985) (holding that plaintiff had not established actionable sexual harassment because she "was not subjected to harassment of a sexual nature"); *Walker v. Sullair Corp.*, 736 F. Supp. 94, 100 (W.D.N.C. 1990) (dismissing plaintiffs hostile environment claim based on harassment that was non sexual in nature and explaining that "[s]exual harassment based on a hostile work environment exists where there are sexual advances"); *Downes v. FAA*, 775 F.2d 288, 290 (Fed. Cir. 1985) ("Sexual harassment is used herein in the sense of offensive behavior of a sexual nature which is prohibited by Title VII").

183 *See Campbell v. Board of Regents*, 770 F. Supp. 1479, 1486 (D. Kan 1991) (treating a man's slapping of a woman on the buttocks as a sexual act).

184 *See Downes v. FAA*, 775 F.2d 288, 295 (Fed. Cir. 1985) (stating that a man stroking a woman's hair at work may or may not be a sexual gesture).

185 *See Quick v. Donaldson Co.*, 895 F. Supp. 1288, 1296 (S.D. Iowa 1995) (stating that "[t]he only thing sexual about 'bagging' [one man grabbing another man's genitals] is that the aggressor aims his non-sexual aggression at genitals"). *But see Belleville*, 119 F.3d at 580 (stating: "Frankly we find it hard to think of a situation in which someone intentionally grabs another's testicles for reasons entirely unrelated to that person's gender.").

186 *See Galloway v. General Motors Serv. Parts Operations*, 1994 WL 673061, *3 (N.D. Ill. Nov. 28, 1994) (concluding that a man calling a female coworker a "sick bitch" "was not overtly sexual in nature"); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1463-64 (treating man's references to female coworker as a "cunt" and "dumb fucking broad" as "sexually explicit and offensive terms," and contending in dicta that referring to a woman as a "worthless broad" was a sexual epithet); *Woerner v. Brzeczek*, 519 F. Supp. 517, 520 N.D. Ill. 1981) (stating in dicta that male supervisor's reference to a female police office as "that broad" was a "sexually-oriented epithet").

187 *See Steiner*, 25 F.3d at 1464 (noting in dicta that calling a man an asshole was not a sexual epithet).

pornography in the workplace sexual?[188] As Schultz has noted, courts have had a difficult time agreeing when conduct is sexual in nature, particularly when the conduct at issue involves crude or sexually suggestive comments as opposed to physical touching.[189] While some courts have taken an expansive view of what constitutes conduct that is sexual in nature, other courts have been far more restrictive.[190]

A more significant problem with the mechanism of harm approach is justifying why—beyond simply intuition or common sense—conduct that singles out certain women or men for particularly harsh treatment should be considered to be because of sex simply because the conduct is sexual in nature.[191] There are two rationales, arising out of

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[188] *See Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir. 1995) (suggesting in dicta that the display of pornographic pictures in the workplace is sexual conduct).

[189] *See* Schultz, *Reconceptualizing Sexual Harassment supra* note __ at 1746-47.

[190] *See Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 n.3 (3rd Cir. 1190) (describing "sexual propositions, innuendo, pornographic materials, sexual[ly] derogatory language" as all actions that are "sexual by their very nature"). *But see* Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 840 (1991) (arguing that "courts tend to define 'sexual' very narrowly based on a man's view of a man's acts.").

[191] Often in the sexual harassment context courts simply conclude without argument or explanation that conduct that is sexual in nature is necessarily because of sex. *See e.g., Andrews*, 895 F.2d at 1482 n. 3 ("The intent to discriminate on the basis of sex in cases involving sexual propositions, innuendo, pornographic materials, or sexual [sic] derogatory language is implicit, and thus should be recognized as a matter of course. A more fact intensive analysis will be necessary where the actions are not sexual by their very nature."); *Konstantopoulos v. Westvaco Corp.*, 893 F. Supp. 1263, 1277 (D. Del. 1994) ("Because at least some of the conduct at issue was sexually explicit, it is fair to draw the conclusion that, by virtue of the conduct, plaintiff suffered intentional discrimination because of her sex"); *Cline v. General Elec. Credit Auto Lease, Inc.*, 748 F. Supp. 650, 654 (N.D. Il. 1990) ("Sexual harassment cases differ because the discriminatory nature of the charged conduct speaks for itself"); *Nichols v. Frank*, 42 F.3d 503, 511 (9th Cir. 1994) (contending that "[s]exual harassment is *ordinarily* based on sex. What else could it be

the sexual harassment literature, for treating sexual conduct as being because of sex. However, while each rationale justifies treating some sexual conduct as being because of sex, neither justifies treating all such conduct as being because of sex and hence actionable under Title VII.

One reason for treating sexual conduct as being because of sex emphasizes the role sexuality has played and continues to play in maintaining and reinforcing gender hierarchy. The argument is that sexual conduct has been used historically and systematically to control and oppress women. Sexual abuse and violence is a, if not the, dominant means by which men enforce and maintain their social power and control over women. The use or threat of male sexual violence toward women is not isolated and discrete. It both reinforces and benefits from a sex-based social hierarchy. As Catharine MacKinnon most notably has argued:

> Sexual harassment . . . is not merely a parade of interconnected consequences with the potential for discrete repetition by other individuals, so that a precedent will suffice. Rather, it is a group-defined injury which occurs to many different individuals regardless of unique qualities or circumstances, in ways that connect with other deprivations of the same individuals, among all of whom a single characteristic—female sex—is shared. Such an injury is *in essence* a group injury.[192]

As a result of the social importance of sex as a means of gender-based control, it does not matter why any individual man chooses to sexually harass any individual

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based on?"); *Belleville*, 119 F.3d at 576 ("Arguably, the content of that harassment [involving explicit sexual overtures] itself demonstrates the nexus to the plaintiff's gender that Title VII requires.").

[192] CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 172 (1979).

woman, the fact that the means chosen for the abuse are sexual warrants treating the conduct as being because of sex. The mechanism of harm was invariably chosen because of the particular power that male-female sexual abuse has in this society.[193] Sexual harassment puts a woman in her place not only as a worker, but as a woman.[194] Moreover, given the ubiquitous threat of sexual violence to women, each instance of sexual harassment by a man toward a woman reemphasizes the looming threat of sexual violence toward all women.[195] Sexual harassment of women by men also reinforces a particular social message that women are primarily, and in all contexts, sexual objects while men are both social and sexual agents.[196] This message is reinforced

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[193] *See* Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 830 (1991) (arguing that workplace conduct that is sexual in nature is particularly dangerous and harmful to women).

[194] *See* MACKINNNON, SEXUAL HARASSMENT OF WORKING WOMEN *supra* note __ at 174 ("Sexual harassment perpetuates the interlocked structure by which women have been kept sexually in thrall to men and at the bottom of the labor market. Two forces of American society converge: men's control over women's sexuality and capital's control over employees' work lives.").

[195] *See* Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment*, 88 GEO. L. J. 1, 33 (1999) ("The common law showed little ability to take into account broad socio-historical changes like the massive influx of women into the workplace and showed less ability to understand that while one crude proposition to one woman on the job might not be earth-shattering, when thousands of women faced this in the workplace everyday, the series of comments could become a significant bar to the workplace happiness and advancement of women as a group.")

[196] Katherine M. Franke, *What's Wrong With Sexual Harassment?* 49 STAN. L. REV. 691, 693 (1997) (arguing that "the sexual harassment of a woman by a man is an instance of sexism precisely because the act embodies fundamental gender stereotypes: men as sexual conquerors and women as sexually conquered, men as masculine sexual subjects and women as feminine sexual objects"). *See also* MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 179 ("sex stereotype is present in the male attitude, expressed through sexual harassment, that women are sexual beings whose privacy and integrity can be invaded at will, beings who exist for men's sexual stimulation and gratification").

even if it is only one or two women in each workplace, rather than all women in all workplaces, who are subject to such sexual advances.[197] For these reasons, even if sexual conduct from a man to a woman in a particular workplace is itself driven by personal animosity or workplace fights rather than by the woman's sex *per se*, [198] the fact that a male co-worker or supervisor chooses sexuality as the mechanism by which to harm the woman, rather than some other means, should make the conduct actionable under Title VII.[199]

This sex as subordination argument is, of course, most persuasive in explaining why a man's sexual targeting of a woman should always be treated as a form of sex discrimination. It is less clear under this argument why all male on male sexual targeting should also be considered so. Such conduct does not look like an attempt by men to

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[197] *See e.g.,* MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 180 ("[S]exual harassment forms an integral part of the social stereotyping of all women as sexual objects and each individual grievant is but one example of it").

[198] *But see*, Mark Mclaughlin Hager, *Harassment as a Tort: Why Title VII Hostile Environment Liability Should Be Curtailed*, 30 CONN. L. REV. 375, 379-82 (1998) (arguing that often sexual harassment of women by men is motivated not by contempt for women as a group but disrespect or dislike for the woman as an individual).

[199] *See* MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN *supra* note __ at 177 (arguing that "[a] guarantee against discrimination 'because of sex' has little meaning if a major traditional dynamic of enforcement and expression of inferior sex status is allowed to persist untouched"); Franke, *What's Wrong With Sexual Harassment? supr*a note __ at 769 (concluding that "where a woman alleges that she has been sexually harassed by a man, a lower quantum of proof is sufficient to trigger an inference of sex discrimination because larger cultural norms of women as sex objects and men as sex subjects have been reproduced in the offending conduct"). *See also, Belleville*, 119 F.3d at 572 ("…the historic imbalance of power between men and women in the workplace offers a very compelling reason why the sexual harassment of a woman by a male superior or co-worker should be understood as sex discrimination.").

express hatred of or to degrade their own sex as a group.[200] Nor does the mechanism necessarily reinforce a sex-based hierarchy in which men as a group are oppressed.

Feminist scholars have persuasively argued that at least some forms of male-male sexual harassment are best understood as efforts to maintain and protect the very same hetero-masculine norms that are critical to men's dominance over women in the workplace and that are enforced through the more standard variety of male-female sexual harassment. As Franke has argued:

> [S]exual harassment is understood as a mechanism by which an orthodoxy regarding masculinity and femininity is enforced, policed and perpetuated in the workplace. Unwelcome and offensive conduct by men directed at women that has the effect of reducing women's identity to that of a sex object while figuring men's identity as that of a sex subject is one example of gender subordination. But so is the sexual harassment of . . . men who were insufficiently masculine and as a result were punished by their male coworkers with a campaign of unwelcome offensive, and hostile conduct of a sexual nature.[201]

Kathryn Abrams similarly views, at least some types, of male-male sexual harassment as a means of "asserting the primacy of male prerogatives or norms in the workplace"[202]

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[200] *See e.g., Goluszek v. H.P. Smith*, 697 F. Supp. 1452, 1456 (N.D. Il. 1988) (dismissing the sex discrimination claim of a man who was harassed sexually by male co-workers because the harassment did not create an anti-male environment and hence was not because of sex under Title VII).

[201] Franke, *What's Wrong With Sexual Harassment? supra* note __ at 760.

[202] *See* Abrams, *The New Jurisprudence of Sexual Harassment supra* note __ at 1209.

by punishing men who deviate from appropriate gender roles.[203]

Yet, even if one finds this argument persuasive, it does not support a conclusion that all male-on-male employment discrimination that is sexual in nature is properly considered to be discrimination because of sex. [204] While it may make sense, for example, to consider the sexual harassment of effeminate men by other men as an attempt to maintain traditional gender norms and, by extension, men's social dominance over women, there is no reason to treat men's sexualized harassment of a hypermasculine gay man in the same way. The hypermasculine gay man is privately challenging norms of heterosexuality—which may, of course, be the reason for the harassment—but his harassment does not police traditional norms of appropriately masculine workplace behavior. The subordination argument also does not justify treating male-male sexualized harassment motivated by the target's age or race, or by personal animosity or workplace disputes, as

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[203] *See* Abrams, *Title VII and the Complex Female Subject supra* note __ at 2516. *See also* MacKinnon, Amici Brief in support of petitioner in *Oncale*, 1997 WL 471814 (arguing that sexual harassment is used by men to keep other men in line and to maintain masculine dominance in the workplace). See also Vicki Schultz, *Reconceptualizing Sexual Harassment supra* note __ at 1776 (explaining that "[j]ust as dominant male workers may harass women who threaten their idealized image of masculinity on the job, they may also harass such nonconforming men. This form of harassment, like harassment of women workers, perpetuates job segregation by sex.").

[204] Franke states, for example, that "when a gay male supervisor requests sexual favors of a male subordinate no larger cultural gender orthodoxy is being policed, perpetuated or enforced" and, as a result, such conduct does not constitute actionable sexual harassment. *See* Franke, *What's Wrong With Sexual Harassment? supra* note __ at 767. Moreover, Franke contends that male-male harassment perpetuated by predominantly straight men on other straight men creating a fraternity-like culture permeated with sexual talk and taunts does not constitute sex discrimination until the "enlightened man" complains of the conduct and is then specifically "targeted for hostile treatment because of his failure to conform to the workplace norms." *Id*. at 768-69.

being because of sex since such conduct again does not police or promote traditional gender roles and sex-based hierarchy.

Similarly, the subordination argument does not justify treating an effeminate gay man's sexual harassment of a normatively masculine straight man as discrimination because of sex. The effeminate gay man's use of sexuality to harm another man does not reinforce or police traditional gender roles that maintain men's dominance over women. Finally, the sex as subordination argument does not justify treating the sexualized harassment of a woman by another woman which is motivated by sexual desire (as opposed to a sense of inappropriate femininity) as being discrimination because of sex. This harassment too, although sexual in nature, does not serve to reinforce gender roles and sex-based hierarchy.

The sex as subordination argument is not without persuasive power, but it does not justify treating all sexual conduct in the workplace as necessarily being because of sex. It is far too tenuous to conclude that all sexual conduct which targets particular women or men reinforces the sex-based subordination of women to men and is, therefore, a form of sex discrimination under Title VII.

A second reason to focus on sexual conduct relies on the assumption that such conduct is motivated by attraction and would not occur if the target was of the other sex. As David Schwartz has noted, "[t]he earliest precedents recognizing a Title VII cause of action for sexual harassment relied on a sexual-desire-based notion of causation."[205] As with the subordination-based rationale, however, the attraction-based rationale can justify treating only a subset of the instances in which sexual conduct is used to disadvantage particular female or male employees as being because of sex.

In practice, courts have used the attraction-based rationale to justify treating sexual harassment by a man

[205] *See* Schwartz, *supra* note __ at 1719.

(presumed to be heterosexual) of a woman as being because of sex, and harassment by a man (known to be gay) of another man as being because of sex.[206] As the Supreme Court explained in *Oncale*:

> Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex. The same chain of inference would be available to a plaintiff alleging same-sex harassment, if there were credible evidence that the harasser was homosexual.[207]

Courts often treat other types of sexual conduct, most notably that by heterosexually identified men toward other

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[206] *See e.g., Belleville*, 119 F.3d at 577 ("The familiar notion is that a woman sexually harassed by a man may claim discrimination under Title VII because the harasser is, presumably, heterosexual and would not have bothered her if she were a man"); *Simenton v. Runyon*, 232 F.3d 33, 37 (2nd Cir. 2000) ("In the context of male-female sexual harassment, involving more or less explicit sexual proposals, it is easy to infer discrimination because of sex since 'it is reasonable to assume those proposals would not have been made to someone of the same sex'") (citation omitted); *Jones v. Flagship Int'l*, 793 F.2d 714, 720 n.5 (5th Cir. 1986) ("Except in the exceedingly atypical case of a bisexual supervisor, it should be clear that sexual harassment is discrimination based on sex"); *Horn v. Duke Homes,* 755 F.2d 599, 604 (7th Cir. 1985) ("But for Horn's womanhood, [her supervisor] would not have demanded sex as a condition of employment"). *See also Barnes v. Costle*, 561 F.2d 983, 990 & n. 55 (noting in dicta that sexual harassment of a man by a male co-worker is sex discrimination if motivated by sexual attraction such that it would not have occurred had the target been a woman); *Peric v. Bd. of Trustees of Univ. of Il*,, 1996 WL 515175 at *3 (N.D. Il Sept. 6, 1996) (same), *Raney v. Dist. of Columbia*, 892 F. Supp. 283, 288 (D.D.C. 1995) (same), EEOC v. *Walden Book Co., Inc.*, 885 F. Supp. 1100, 1103-04 (M.D. Tenn. 1995) (same).

[207] *Oncale*, 523 U.S. at 80.

men, as not being because of sex.[208] Courts simply assume that when publicly heterosexual men act sexually toward women this is motivated by sexual attraction and when these same men act sexually toward other men it is not.

While courts make oversimplifying assumptions about the binary nature of sexual desire and the meanings and motives of human sexual conduct, they are probably right in concluding that not all conduct that is sexual in nature is motivated by sexual desire.[209] Courts have noted that heterosexual men may at times use sexual conduct as a means of expressing dislike or hostility toward another man without being motivated by sexual attraction toward the

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[208] See *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191 (4th Cir. 1996) (concluding that the verbal and physical assaults of a sexual nature suffered by the plaintiff did not establish actionable sexual harassment because they were committed by a heterosexual man against another heterosexual man); *Mayo v. Kiwest*, 1996 WL 460769 (4th Cir. Aug. 15, 1996) (affirming dismissal of plaintiff's sexual harassment claim because although plaintiff was subjected to verbal and physical abuse that was sexual in nature his attackers "were indisputably males and Mayo makes no claim that either was homosexual or bisexual"); *Walden Book Co.*, 885 F. Supp. at 1102 (distinguishing the actionable same-sex sexual harassment present in that case from the non actionable harassment present in *Goluszek* by stating: "*Goluszek* is clearly distinguishable from the instant case because *Goluszek* involved sexual teasing of a heterosexual male by other heterosexual males rather than sexual harassment of a subordinate by a homosexual supervisor.").

[209] *See generally* Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000) (evaluating the major sex studies measuring the prevalence of bisexual orientation and noting that "each study found the incidence of bisexuality was greater than or comparable to the incidence of homosexuality"); Schwartz, *supra* note __ at 1763 (noting that "the notion that harassment is 'because of sex' when demonstrably based on sexual attraction posits a world of Kinsey zeroes and Kinsey sixes . . . in which everyone is sexually attracted either to someone of the opposite sex if heterosexual, or of the same sex if homosexual"); ALFRED C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN MALE 610-66 (1948) (rating heterosexuality and homosexuality on a zero to six scale and explaining that "nearly half (46%) of the population engages in both heterosexual and homosexual activities . . . in the course of their adult lives").

target.[210] It is likely that heterosexual men may also at times choose sexual means to harm women because these means are particularly hurtful and not because they are motivated by sexual desire.[211] It is perhaps not surprising then that the Supreme Court in *Oncale* rather defensively proclaimed that it had "never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations."[212] The attraction-based rationale, either with or without the courts' simplifying assumptions about the binary nature of human sexuality, simply cannot justify treating all discriminatory conduct that is sexual in nature as being because of sex.

While the mechanism of harm approach to trait discrimination treats too much conduct as actionable sex discrimination, perhaps an even bigger problem with this approach is the range of conduct it misses. Under the mechanism of harm approach, a woman who is singled out for discriminatory treatment because she is perceived as particularly aggressive or competitive will not have a cause

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[210] *See e.g., Spearman*, 231 F.3d at 1085 (holding that even though plaintiff's harassers used "sexually explicit, vulgar insults to express their anger" with the plaintiff, their harassment was caused by "acrimony over work-related disputes" and was not because of plaintiff's sex); *Johnson v. Hondo Inc*., 125 F.3d 408, 412 (7th Cir. 1997) (holding that sexually explicit remarks made by male co-workers to male plaintiff were "simply expressions of animosity or juvenile provocation" and were not made because of plaintiff's sex).

[211] *See Belleville*, 119 F.3d at 590 (noting that "[m]en sexually harass women in the workplace for reasons other than sexual desire"). *See also* Franke, *What's Wrong With Sexual Harassment? supra* note __ at 743 (arguing that "men engage in offensive sexual conduct in the workplace primarily as a way to exercise or express power, not desire"); MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN *supra* note __ at 199 ("[M]ale sexual advances may often derive as much from fear and hatred of women and a desire to keep them in an inferior place as from genuine positive attraction or affection, although the perpetrator may be unaware of his feelings"); Estrich, *supra* note __ (arguing that there is something particularly harmful about sexual conduct in the workplace).

[212] *Oncale*, 523 U.S. at 80.

of action if the discriminatory treatment takes the form of a heavier than normal workload, particularly intense monitoring, or denied promotions. Women who are singled out because they have attributes that effectively challenge the sex-based hierarchy of the workplace are not entitled to protection under this approach unless their employer chooses to harm them using sexual rather than nonsexual means. As Schultz has argued in the context of analyzing sexual harassment cases, courts' narrow and exclusive focus on the sexual nature of the harassment involved misses a great deal of nonsexual conduct that serves to undermine women's competence in the workplace and their ability to compete on equal terms with men.[213] The mechanism of harm approach to trait discrimination similarly misses much trait discrimination that, while nonsexual in nature, nonetheless serves to reinforce a sex-based employment hierarchy.

Just as a sexuality-focused mechanism of harm approach was an inadequate response to the question of when harassment should be considered actionable sex

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[213] Shultz contends:

> [The sexual desire-dominance paradigm] omits—and even obscures—many of the most prevalent forms of harassment that make workplaces hostile and alienating to workers based on their gender. Much of what is harmful to women in the workplace is difficult to construe as sexual in design. . . . The prevailing paradigm, however, may also be overinclusive. By emphasizing the protection of women's sexual selves and sensibilities over and above their empowerment as workers, the paradigm permits—or even encourages—companies to construe the law to prohibit some forms of sexual expression that do not promote gender hierarchy at work.

Schultz, *Reconceptualizing Sexual Harassment, supra* note __ at 1689. *See also* Vicki Schultz, *The Sanitized Workplace*, 112 YALE L. J. 2061 (2003) (discussing the tendency of employers to unnecessarily sanitize the workplace of sexual conduct that does not undermine women's competence ostensibly under the guise of Title VII's sexual harassment prohibitions).

discrimination, so too is it an inadequate response to the question of when trait discrimination should be considered actionable sex discrimination. Focusing only on the means by which certain women or men are singled out for discriminatory treatment—without also looking at the social meaning and effect of their being singled out—leads to treating both too much and too little trait discrimination as sex discrimination. In the next section, therefore, I present an alternative response.

V. Power/Access Approach

The power/access approach treats as actionable sex discrimination only those forms of sex-specific trait discrimination that are based on gender norms or scripts that inhibit the ability of individuals of a particular sex to participate successfully in the work world. Under this view, Title VII does not require the elimination or nonenforcement of all gender norms through rigidly neutral employment rules. Instead, it requires the nonenforcement or elimination of only those gender scripts and gender norms that actually inhibit sex equality in the workplace.[214]

Sex-specific forms of trait discrimination generally arise out of and reflect gender norms. The reason an employer allows women but not men to wear dresses is because women who wear dresses are social conformists while men who wear dresses are not. The power/access approach demands an examination of the gender norms driving the trait discrimination in each case. The power/access approach recognizes that all gender norms are not created equal. Some are far more dangerous to sex

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[214] Robert Post has offered a similar interpretation of Title VII. Post explains that "customary gender norms are incorporated into the very meaning and texture of Title VII. So far from striking 'at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes,' the statute in fact negotiates the ways in which it will shape and alter existing gender norms." Robert C. POST, PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW 39 (2001).

equality than others. Moreover, it also recognizes the significant costs both to employers and to employees that are likely to flow from an enforced blindness to all gender norms. The power/access approach calls, therefore, for a necessarily context specific process of social transformation whereby nondiscrimination is equated not with formal neutrality, but with the elimination of only particularly harmful or limiting gender norms.[215] Because the power/access approach determines when actionable sex discrimination exists not by following an abstract rule but by looking at the social meanings and effects of sex-specific trait discrimination in each instance, the approach is best explained through application.

A. The Power/Access Approach Applied

The following examples help illuminate the approach and clarify the ways in which it differs from the other approaches to trait discrimination discussed thus far.

1. Aggressive/Masculine Women

The power/access approach would treat an employer's discrimination against aggressive women as an actionable form of sex discrimination even if the employer had a stellar record of hiring women generally. If employers were permitted to act upon the gender script equating aggressiveness in women with bitchiness, all women would be undermined in their ability to participate fully and successfully in the workplace. Aggressiveness and

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[215] Another way to conceive of my approach is as requiring employers to change the work world to a degree, and then no farther. Title VII requires employers to transform the work world so as to better fit and include certain types of women and men, but not others. The line between those who get protection and those who do not is neither natural nor arbitrary, but the product of competing social concerns about liberty and equality. For a similar argument made in a very different context *see* Daniel Wikler, *Paternalism and the Mildly Retarded*, 8 PHILOSOPHY AND PUBLIC AFFAIRS 377 (1979. I thank Larry Alexander for bringing this article to my attention.

competitiveness are almost always required, either explicitly or instrumentally, for an employee to move up the corporate ranks. Allowing employers to exclude aggressive, competitive women because such women are perceived as unappealing would encourage all women to adopt traditionally feminine, passive, and deferential attributes in order to avoid such discrimination. Women with such traits, however, would be less likely to move up the corporate ladder. To the extent employers are permitted to act on the norm against aggressiveness in women, women as a group are hindered in their ability to integrate the work world and end its sex-based hierarchy.

Consider, for example, a litigation law firm that promotes almost exclusively from within its own ranks. The hiring partners at the firm have no problem hiring women and regularly hire entering classes that are fifty percent women. The partners simply refuse to hire women who they perceive to be aggressive, loud and competitive. The partners just do not like women with these personality traits, preferring women who are a bit more "girly," giggly, and deferential. They regularly hire women from top law schools who fit this mold. Despite the law firm's frequent hiring of female associates, very few women are invited to join the partnership ranks. In order to become an equity partner in the firm a candidate must have a reputation as a tough and aggressive litigator and be able to bring business into the firm. By the time associates reach the firm's six year up or out deadline, significantly fewer female associates than male associates have these attributes. Without any discrimination taking place at the time of the partnership decision, far fewer women than men are promoted to partner at the firm.

The Supreme Court recognized just such a catch-22 in *Price Waterhouse v. Hopkins*. Ann Hopkins could not meet the objective qualifications for partnership without being personally aggressive, yet the perception of aggressiveness as unappealing disqualified her. The Court rightly

concluded in that case that discrimination against aggressive women constituted actionable sex discrimination. The power/access approach, however, better articulates the concerns motivating this judgment than did the trait equality logic the court in fact relied upon.

2. Effeminate/Nurturing Men

The power/access approach would also treat discrimination against effeminate men as an actionable form of sex discrimination. As numerous scholars have argued, discrimination against effeminate men is often a means of policing gender roles in the workplace and reaffirming gender scripts that discourage men from engaging in nurturing and caregiving activities.[216] Such discrimination pushes men to act in hyper masculine and traditionally macho ways. While such role policing certainly confines men, it also undermines women's ability to compete successfully in the workplace. Enforcing a code of hypermasculinity on male employees reinforces women's position as different and other. Moreover, hypermasculinity defines itself not only as different from that which is female but as distinctly superior to it. Men exclude and harass other men who seem too feminine in order to emphasize not only their difference from but their dominance over that which is feminine.[217] Allowing employers to discriminate against effeminate men reinforces gender norms by which male workers are defined in large part by their superiority

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[216] *See e.g.,* Franke, *What's Wrong With Sexual Harassment? supra* note __ at 760; Abrams, *The New Jurisprudence of Sexual Harassment supra* note __ at 1205; Abrams, *Title VII and the Complex Female Subject supra* note __ at 2516; Schultz, *Reconceptualizing Sexual Harassment supra* note __ at 1776.

[217] Catharine MacKinnon, for example, analyzes both the cause and desired effect of the harassment of a gender deviant man by his male co-workers as follows: "Goluszek was punished, ostracized, insulted, and forced to consume pornography to make him conform to [his male co-workers'] stereotype of how a man should be a man by subordinating women sexually." MacKinnon, Amici Brief in *Oncale*, 1997 WL 471814 at *10-11, referring to *Goluszek v. Smith*, 697 F. Supp. 1452 (N.D. Il. 1988).

over their female co-workers. Women will not be able to compete effectively or fairly in the work world as long as norms defining men as opposite and superior to women are reinforced.

The power/access approach would for similar reasons protect male employees from being discriminated against for displaying nurturing or caregiving behavior that female employees are permitted to engage in. Imagine a male kindergarten teacher who is fired for exhibiting the same kind of nurturing behavior that female teachers regularly display with their students, and a male lawyer who is terminated for arranging his work schedule to engage in caregiving activities that his female colleagues routinely schedule their work around. The power/access approach would prohibit both types of trait discrimination because both stem from and reinforce gender scripts which treat nurturing and caregiving activities as appropriate and laudable only for women. As long as such norms are enforced and men are discouraged from being nurturing and engaging in caregiving, women will continue to be responsible for the bulk of these responsibilities. As long as women continue to be dominantly responsible for these life sustaining activities they will not be able to compete fully and fairly with men in the public sphere.

3. Men in Dresses

The power/access approach to trait discrimination would not treat as an actionable form of sex discrimination an employer's refusal to hire men who wear dresses to work (or high heels, or lipstick) while not objecting to women engaged in the same behavior. Certainly, allowing employers to act on gender norms frowning upon men in dresses encourages discrimination against cross-dressing men. Yet eradicating this particular gender norm is not necessary for the substantive equality of women and men in the work world. Men are not excluded from matching the ideal worker by being prevented from wearing dresses. The

ideal worker looks like a man in a suit. Women, likewise, are not harmed by having male employees' clothing choices limited in a way theirs is not. Female employees may still mimic the ideal male style or choose to dress in a way that is more gender specific.

If employers were not permitted to adopt such a sex-specific "no men in skirts" work rule, they might, of course, choose to permit both men and women to wear skirts. Alternatively, and I have argued more likely, they would simply not permit either sex to wear skirts. Women and male cross-dressers then both lose. However, even, if employers responded to a prohibition on sex-specific trait discrimination by permitting men to wear dresses, it is unlikely that this would improve the status or ability of women to compete. Women seeking to be viewed as competent and to be taken seriously in the work world seem to benefit from downplaying rather than highlighting gender differences.[218] If a very large number of men began wearing dresses to work, women might reap some benefits from their easy fit within the new clothing norms. Such a wave of men in women's clothes is, however, unlikely. It is more likely that even if men were permitted to wear dresses, workplace clothing norms would remain essentially the same—a masculine version of androgyny.[219] Indeed, men in dresses might serve only to emphasize the nonnormativity of feminine dress that is usually, although not exclusively, associated with women. Allowing men to wear dresses might actually serve to heighten workplace gender norms

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[218] *See* Sandra Monk Forsythe, Mary Frances Drake, and Charles A. Cox, Jr., *Dress As An Influence on the Perceptions of Management Characteristics in Women*, 13 HOME ECONOMICS RESEARCH J. 112 (1984) (explaining that personnel administrators found female applicants for managerial positions to be least forceful, self-reliant, dynamic, aggressive, and decisive when they wore distinctly feminine clothing as compared to more masculinely styled outfits); *see also* Sandra Forsythe, Mary Frances Drake, and Charles A. Cox, *Influence of Applicant's Dress on Interviewer's Selection Decisions*, 70 J. OF APPLIED PSYCHOL. 374 (1985).

[219] Case, *supra* note __ at 7.

even while blurring somewhat the equation of gender with sex.

4. Women in Pants

In contrast, the power/access approach would treat an employer's policy of prohibiting women from wearing pants while allowing/requiring men to do so as a form of sex discrimination. The gender norm such trait discrimination rests upon not only emphasizes women's difference from men and the ideal worker norm, but also emphasizes their sexuality. Men continue to dominate the upper echelons of the work world, and workplace norms for both clothing and behavior continue to be, as Case described them, "androgynous slanting toward the masculine."[220] Requiring women to wear skirts emphasizes their difference from men and from normative workplace behavior more generally. Moreover, such a requirement emphasizes women's femininity which may itself undermine their perceived professional competence.[221] Allowing employers to act upon the gender script that women belong in skirts prevents women from mimicking the normative dress code of the ideal worker, maximizing their perceived competence, and thereby optimizing their ability to compete as effectively as possible against men in the work world.[222]

5. The Sexually Harassed Woman/Man

As discussed in Part I, sexualized harassment of women may sometimes be a form of ontological discrimination—if all women in a workplace are harassed—and at other times a form of trait discrimination—if only particular women in a workplace are harassed. The

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[220] Case, *supra* note __ at 7.

[221] *See* Forsythe, Drake, and Cox, *supra* note __ .

[222] There has in fact been some legislative protection for women to wear pants. *See* Cal. Gov't Code §12947.5(a) (Deering 1995) (providing that "It shall be an unlawful employment practice for an employer to refuse to permit an employee to wear pants on account of the sex of the employee.").

harassment may look like a form of sex-specific trait discrimination to the extent that women are being singled out for harassment because of a particular trait—e.g. physical attractiveness or professional aggressiveness—for which men are not treated adversely. The discrimination looks different from the other forms of sex-specific trait discrimination discussed in that it does not involve a formal employment requirement, yet the discrimination may still act so as to informally exclude or disadvantage particular types of women or men.

The power/access approach calls for treating sexualized harassment of women by men as actionable sex discrimination in all cases because of the method of discrimination chosen, irregardless of its underlying cause. Sexual violence by men against women is historically pervasive.[223] Sexual violence and the fear of sexual violence keeps women passive, circumscribed in their movements, and dependent upon men for protection.[224] When a man

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[223] *See e.g.*, CATHARINE MACKINNON, FEMINISM UNMODIFIED 169 (1987) (arguing that "[r]ape, battery, sexual harassment, forced prostitution, and the sexual abuse of children emerge as common and systematic," and citing studies showing that up to 44 percent of American women will be raped in their lifetime, and thirty-eight percent of girls are sexually molested inside or outside the family); *United States v. Morrison*, 529 U.S. 598, 633 (2000) (Souter dissent) (referring to evidence presented before Congress in support of the Violence Against Women Act that "'[a]ccording to one study, close to half a million girls now in high school will be raped before they graduate" and "'[one hundred twenty-five thousand] college women can expect to be raped during this—or any—year'") (internal citations omitted).

[224] *See* Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517, 539 (1993) (arguing that "street harassment severely restricts the physical and geographical mobility of women. It not only diminishes a woman's feelings of safety and comfort in public places, but also restricts her freedom of movement, depriving her of liberty and security in the public sphere"). *See also United States v. Morrison*, 529 U.S. 598, 633 (2000) (Souter dissent) (referring to evidence to Congress in support of the Violence Against Women that "'[t]hree-quarters of women never go to the movies alone after dark because of the fear of rape and nearly 50 percent do not use

chooses sex as a means to hurt a woman he is taking advantage of and reinforcing a gender script whereby women are sexual victims vulnerable to attack by some men and dependent on others for protection. It does not matter, therefore, why certain women are singled out for abuse. The fact that sexuality is used as the means to harm some women reinforces a gender script that inhibits the social freedom and workplace equality of all women.[225]

In contrast, the targeting and sexualized harassment of certain men by other men in the workplace does not warrant the same categorical treatment as sex discrimination under the power/access approach. Instead, closer inspection is required into the cause for the harassment in each case.

Male-male sexualized harassment does not by its very nature reinforce a sex-based hierarchy in the way that male-female sexualized harassment does. Often such harassment does serve as a way to police gender roles and to reinforce gender hierarchy by punishing men who do not behave in appropriately masculine (and non feminine) ways. But male-male sexual harassment is not always about policing gender roles and does not always do so. At times such abuse may be chosen as a way to punish a gender

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public transit alone after dark for the same reason'") (internal citation omitted).

[225] Bowman has made a similar argument about the significance and impact of men's street harassment of women. Bowman argues:

> [A]ny incident of harassment, no matter how "harmless," both evokes and reinforces women's legitimate fear of rape. It does so by reminding women that they are vulnerable to attack and by demonstrating that any man may choose to invade a woman's personal space, physically or psychologically, if he feels like it. Thus, street harassment forms part of a whole spectrum of means by which men objectify women and assert coercive power over them, one which is even more invidious because it is so pervasive and appears, deceptively, to be trivial.

Bowman, *see supra* note __ at 540.

conforming man for other reasons—e.g. a workplace or personal dispute. In such instances, sexual means are chosen because they are particularly hurtful, but the mechanism does not in such instances, in and of itself, reinforce a sex-based hierarchy.

Therefore, unlike in male-female sexualized harassment cases, in cases involving male-male sexualized harassment, labeling the harassment as a form of sex discrimination requires an exploration into the actual cause for the harassment. To the extent the victims are being singled out because of their effeminacy, then the harassment looks like an actionable form of sex-specific trait discrimination—namely discrimination against effeminate men. To the extent, however, that the harassment seems to be based on and driven by personal or professional animosity toward the targeted men, then the discrimination does not seem to be motivated by a particular gender norm, nor does it seem to be in anyway because of sex. Harassment should not be treated as actionable sex discrimination solely because one man chooses to express his dislike for another through sexual means. Such means should certainly be prohibited by employers, but they do not translate all expressions of male-male hostility into manifestations of sex discrimination.

6. The Gay Man/Lesbian Woman

Sometimes an employer will freely hire both women and men but simply refuse to hire women and men who are, or are believed to be, gay. Clearly such discrimination is trait-based in the sense that neither all women nor all men are excluded, but only those with a particular trait. Characterizing the discrimination as sex-specific or sex-neutral is, however, more difficult and highlights the fuzziness of the distinction. An employer could frame its policy in a sex-neutral way as: "No gays allowed." Alternatively, an employer, or more likely a legal academic, could frame its discrimination in a sex-specific way as: "No

women who have sex with women. No men who have sex with men." Framing the discrimination in this sex-specific and non neutral way leads to the conclusion that the discrimination is a form of sex discrimination under the trait equality approach. Such a conclusion does not, however, follow under the power/access approach.

The requirement that a woman cannot have sex with a woman while a man can have sex with a woman is certainly based on a gender norm of appropriate social and sexual behavior for women. Proper femininity requires social and sexual attachment to men. Moreover, allowing employers to act on this gender norm regarding appropriate female behavior reinforces a particular social hierarchy. Yet it is the hierarchy of straight women over gay women rather the hierarchy of men over women. This distinction is critical. There are good reasons to prohibit employers from acting on gender norms equating proper femininity (or masculinity) with heterosexuality and deviant femininity (or masculinity) with homosexuality. Acting on these norms reinforces the hierarchy of straight over gay. Acting on these norms does not, however, reinforce the particular caste hierarchy that Title VII was aimed at. [226]

I have here distinguished conceptually between discrimination against gay men and lesbians which I argue is not properly conceived of as sex discrimination and discrimination against effeminate men and masculine women which I argue is. As a practical matter, it is, of course, often difficult to distinguish between discrimination because of sexual orientation and discrimination because of

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[226] *See generally* Stein, *supra* note __ at 503 (arguing that "Laws restricting the rights of gay men and lesbians violate principles of equality primarily because such laws discriminate on the basis of sexual orientation, not because they discriminate on the basis of sex"); Cheshire Calhoun, *Separating Lesbian Theory from Feminist Theory*, 104 ETHICS 558, 562 (1994) (contending that "patriarchy and heterosexual dominance are two, in principle, separable systems. Even where they work together, it is possible conceptually to puss the patriarchal aspect of male-female relationships apart from their heterosexual dimensions").

gender nonconformity. Discrimination by men against other men in the workplace often seems to be about both, or seems to at least blend one with the other. In cases in which gender nonconformity and homosexuality are both at issue, the discrimination should be treated as actionable under Title VII. The fact that discrimination may be motivated in part by homosexual status should not strip discrimination based on gender nonconformity of its protected status. However, the mere fact that a gay person is targeted for discrimination does not in and of itself warrant treating the conduct as sex discrimination under the power/access approach.

It is worth emphasizing that the distinction I draw between actionable and non actionable trait discrimination does not depend on the mutability of the trait at issue. I have argued that discrimination based on aggressiveness in women is actionable while discrimination based on a man's cross-dressing is not. It is not at all clear, however, that it is any more difficult for an aggressive woman to change and soften her mannerisms than it is for a man drawn to cross-dressing to change his mode of attire. Both traits are probably fairly mutable. My distinction also does not depend on whether discrimination based on a particular trait is likely to be random and idiosyncratic or systemic and socially prevalent. Men in dresses, for example, probably face more consistent workplace discrimination than do aggressive/masculine women. Instead, my distinction between actionable and non actionable trait discrimination relies on a determination about whether the discrimination arises out of particular gender norms and scripts that society must change in order to dismantle a sex-based hierarchy in the work world. In the next section I provide a more expansive defense of this approach.

B. A More Expansive Defense

The power/access approach to trait discrimination recognizes that sometimes an employer who freely hires

women (or men) may still discriminate against a subset of women (or men) in such a way as to reinforce a caste-like hierarchy of men over women in the workplace. The approach in effect responds to sex-specific forms of trait discrimination in the same way the disparate impact doctrine responds to sex-neutral forms of trait discrimination: by focusing on whether the trait requirements act as "build-in headwinds" to the effective participation of members of a protected group.[227]

By focusing on the source and effect of particular types of sex-specific trait discrimination, the power/access approach avoids the underinclusiveness problems of the immutable trait/fundamental right, group-identity, and mechanism of harm approaches. It also avoids the overinclusiveness problems of the trait equality approach.

In practice, the power/access approach and the trait equality approach will usually reach the same results, treating most instances of sex-specific trait discrimination as impermissible sex discrimination. It is simply the case that most gender norms do normalize female weakness and male dominance in a way antithetical to sex equality in the workplace. However, the fact that the power/access approach responds to the problem of sex- specific trait discrimination with a socially contingent standard rather than with a formal rule is theoretically and practically significant. Theoretically, the power/access approach

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[227] In *Griggs* the Supreme Court invalidated the employer's requirements of a high school diploma and the passing of a standardized general intelligence test in order to be hired for certain jobs on the grounds that the requirements disproportionately excluded African American workers. The Court explained that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." 401 U.S. at 433. As I have discussed previously, disparate impact and disparate treatment analyses of trait discrimination may also be similar in that the question of whether the trait is one that matters enough to warrant legal protection is at the core of both frameworks. See *supra* note __.

reflects the intuition that nondiscrimination between the sexes requires something other than rigid neutrality. It conceives of nondiscrimination as being about the substance of gender norms and the social way in which gender is constructed and played out, rather than about the existence of gender differences *per se*. Practically, the fact that the power/access approach allows for the possibility of some sex-specific job requirements means that employers will feel less pressure to mandate a narrowly homogenous, androgynous work place.

Conclusion:

This paper began by emphasizing the differences between ontological and trait based discrimination. The two are distinct in important ways. Ontological discrimination in which all women (or all men) are categorically excluded or disadvantaged is clearly "because of" sex. Trait discrimination, of either a sex-neutral or sex-specific variety, in which only a subset of women or men are excluded, is less clearly so.

Yet, as this paper has suggested, ontological discrimination and sex-specific trait discrimination are conceptual cousins. While ontological discrimination is often based on an allegiance to gender roles and a belief that women (or men) simply do not belong in certain places, sex-specific trait discrimination too often stems from gender norms or scripts dictating appropriate and inappropriate behavior for women (or men). Just as Title VII clearly prohibits employers from acting on social gender roles that call for the blanket exclusion of all women or men from particular jobs, so should title VII prohibit employers from acting on gender norms or scripts which, in perhaps more complex and subtle ways, make it more difficult for individuals of one sex or the other to participate effectively in the work world. The power/access approach demands just such a focus. It treats as actionable sex discrimination those forms, and only those forms, of sex-specific trait

discrimination grounded on gender norms and scripts that a society concerned about substantive equality must be invested in changing.

The core contention of this paper has been that some sex-specific employment requirements should be permitted and that nondiscrimination does not require rigid sex neutrality. Given the controversial nature of this claim, it is worth recognizing and responding to the two distinct ways in which my argument may be read and understood. One could view my argument as reflecting a perfectionist belief in the importance for human flourishing of maintaining gender roles and differences. The argument would be that I allow employers to act upon some gender differences because I think maintaining gender roles is, at least to some degree, good for individuals. I am not, as a general matter, opposed to courts interpreting social legislation based on some underlying perfectionist beliefs. Indeed, I have argued elsewhere that significant areas of civil rights law cannot be understood without recognizing a covert perfectionism driving the decisions.[228] As I stated at the outset, however, my approach in this paper is better understood, not as a perfectionist argument, but as a pragmatically liberal effort at statutory interpretation. Title VII seeks to end caste-like sex hierarchy in the workplace. It should, therefore, prohibit employers from acting, in either an ontological or trait-based way, on gender norms that reinforce such hierarchy. Yet not all gender norms are created equal and not every gender difference should be equated with gender inequality.

The courts, as it turns out, have generally gotten these cases right. Courts seem to be applying something of a "sniff test" to cases of sex-specific trait discrimination. They treat discrimination against women with small children as actionable sex discrimination, along with discrimination

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[228] See Kimberly A. Yuracko, *One for You and One for Me: Is Title IX's Sex-Based Proportionality Requirement for College Varsity Athletic Positions Defensible?* 97 NW. U. L. REV. 731 (2003); Yuracko, *Private Nurses and Playboy Bunnies, supra* note __.

against aggressive women, and that against effeminate men. Yet, for reasons not fully articulated, they refuse to treat as actionable discrimination against men in dresses. These decisions may at first look inconsistent and unprincipled. When viewed through the lens of the power/access approach, however, they become coherent. In other words, the courts seem to be intuiting what the power/access approach makes explicit—namely that while Title VII certainly requires a social transformation, the transformation called for need not result in a homogenized and genderless workplace.